S. HRG. 99-695

NOMINATION

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

ROBERT E. RADER, JR., OF TEXAS, TO BE A MEMBER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

MARCH 12, 1986

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NOMINATION

WEDNESDAY, MARCH 12, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee convened, pursuant to notice, at 10:06 a.m., in room SD–430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Stafford, Simon, Quayle, Metzenbaum, and Grassley.

Senator STAFFORD. Before we officially begin, Mr. Chairman, I am reminded of the John Wayne movies here. Just as I was about to bang the gavel for you, you came charging in with your troops.

The CHAIRMAN. Well, I want you to know that I am very appreciative you were willing to do that, and I apologize for starting late this morning, but as you know, we have got balanced budget amendments up and all kinds of other conflicts, and frankly, I have just been almost beside myself with some of the conflicts I have had today.

Senator STAFFORD. Well, join me in working on Superfund, if you think that is tough.

The CHAIRMAN. Yes, that really is a conflict.

Let me begin the hearing. Today, we are meeting to consider the nomination of Robert E. Rader, Jr., to be a member of the Occupational Safety and Health Review Commission.

Mr. Rader is currently serving as a member of the Occupational Safety and Health Review Commission as a recess appointee. Prior to his appointment, Mr. Rader was a partner in the law firm of McCarty, Wilson, Rader & Mash in Ennis, TX, where he specialized in administrative law.

Mr. Rader is a graduate of the Southern Methodist University Law School and of Harding College. He has had extensive experience with the Occupational Safety and Health Administration and the Review Commission and is a respected commentator on the Occupational Safety and Health Act.

His articles have appeared in the Baylor Law Review and the Dickinson Law Review.

Mr. Rader, we want to welcome you to our committee, and I hope we will be able to move forward on your nomination as quickly as possible and in an expeditious manner.

I think the Occupational Safety and Health Review Commission deserves to have members who have been confirmed by the Senate, and I hope that we can complete this hearing today.

With that, let us turn to Senator Metzenbaum.

Senator METZENBAUM. Mr. Rader, tell us why you want to serve on the OSHA Review Commission——

The CHAIRMAN. Howard, we are doing opening statements right now.

Senator METZENBAUM. All right. I have no opening statement.

The CHAIRMAN. All right. Senator Stafford.

Senator STAFFORD. I have no opening statement.

The CHAIRMAN. Mr. Rader, do you have an opening statement—oh, excuse me. I am sorry.

Senator Simon.

Senator SIMON. I am used to being ignored, Mr. Chairman.

The CHAIRMAN. Oh, no, he is not. [Laughter.]

It is just that my glasses are not working as well this morning. I have not needed them for the last couple of days, but I do need them now.

Senator METZENBAUM. Recognize the Senator on the far left.

The CHAIRMAN. He does not have white hair. [Laughter.]

Senator SIMON. Just let me simply say I have a great concern that those who administer programs—believe in the programs. And I would be less than candid if I did not say there is a serious question on the part of some us as to whether or not you, Mr. Rader, believe in the program. I think that is what you have to convince some of the members of this committee of.

The CHAIRMAN. Thank you. At this point we will include a statement by Senator Grassley in the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR CHARLES GRASSLEY

The Occupational Safety and Health Review Commission is an independent quasijudicial agency established by the Occupational Safety and Health Act of 1970. The Commission is responsible for ruling on disagreements that arise over the results of safety and health inspections performed by the Occupational Safety and Health Administration. Both employers and employees have the right to dispute the results of an OSHA inspection.

Mr. Robert E. Rader, Jr., has been nominated by the President to be a member of the Occupational Safety and Health Review Commission. He has served as a member of the Commission as a recess appointee since last fall. Prior to that, Mr. Rader had extensive experience in representing employers in OSHA cases. He has also published a number of articles on the Occupational Safety and Health Act.

Opponents to Mr. Rader's nomination contend that there is an anti-OSHA bias in Mr. Rader's writings and in his handling of cases for corporate clients. While the position for which he has been nominated requires the committee to be cognizant of these contentions, I do not believe it is the duty of this committee to pass judgment on Mr. Rader's writings or on how he handled OSHA cases for his clients. Rather, we must determine, to the best of our ability, whether Mr. Rader will carry out his duties as a member of the Commission to the best of his ability. Since Mr. Rader has been serving on the Commission for some months as a recess appoint-

ment, he should have established a track record in that regard that this committee can examine.

I am certain that today's hearing will be enlightening to the members of the committee. I am looking forward to reviewing the evidence that will be presented.

The CHAIRMAN. Mr. Rader, do you have any comments you would care to make—before you do, I notice that Senator Gramm from Texas is here. Why don't we turn the time over for his remarks?

Senator, we welcome you before our committee. We are very happy to have you here, and we appreciate any comments you wish to make at this time.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Thank you, Mr. Chairman.

Let me first say, Bob, that anybody carrying that big a briefcase is either into weightlifting or heavy work.

Mr. Chairman, I am happy to be here today to introduce my friend and constituent Bob Rader.

I have known Bob for these many years as my friend and supporter, but also as a brilliant and well-respected attorney. He has done work both in terms of the practice of law and writing in distinguished academic journals on the subject matter of OSHA enforcement and OSHA jurisdiction. He has what I believe to be a very distinguished record.

I believe that people who know him, who have practiced law with him, who have engaged in business with him, and those judges he has come before have all recognized his eminent knowledge and his effective abilities in these areas.

I wanted to come before the committee as Bob's former Congressman and now Senator to strongly recommend him to you.

I know that this area is a very difficult and controversial area. I would simply submit, Mr. Chairman, that Bob Rader represents a viewpoint that is held by the President of the United States. There are 3 million people who work for the Federal Government. The President gets to appoint about 3,000 people. And I believe that if those people are competent and if they represent his philosophy, then they ought to be confirmed.

I am not an expert in the area of labor law or OSHA, have never served on a committee with any jurisdiction in that area. But I do know Bob Rader both personally and by reputation, and I can certainly tell this committee that he is held in the highest esteem and in the highest regard in my State.

The CHAIRMAN. Well, thank you, Senator. I think those are words of high praise. We have a great deal of respect for Senator Gramm in this body, and I think on both sides of the floor. He believes in what he does, and he stands up for what he believes. So we appreciate having you here today, and I think that certainly weighs heavily on my part.

Mr. Rader, do you have any opening remarks?

STATEMENT OF ROBERT E. RADER, JR., NOMINATED TO BE A MEMBER, OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Mr. RADER. Mr. Chairman, I believe you have a statement from me. I have no additional comments. I would like to thank Phil Gramm for appearing here this morning. I know he has a busy schedule, and I appreciate it.

The CHAIRMAN. Thank you.

Mr. RADER. I am here to answer your questions. I understand that there are areas of concern, and that is why I am here.

[The prepared statement and biographical sketch of Mr. Rader follow:]

STATEMENT OF
ROBERT E. RADER, JR.
NOMINATED TO BE COMMISSIONER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Mr. Chairman and Distinguished Members of the Committee:
I am greatly honored to have been nominated by President Reagan to serve as Commissioner of the Occupational Safety and Health Review Commission. I am happy to appear before this committee and I will do my best to answer as completely as possible any questions the Committee may have.

The Occupational Safety and Health Review Commission is a small independent agency created to carry out the adjudicatory functions under the Occupational Safety and Health Act of 1970. The Review Commission has been described as an Administrative Court System. At the trial or hearing level there are approximately 20 administrative law judges assigned to one of four regional offices. The administrative law judges hold hearings and render judgments with findings of fact and conclusions of law. The three commissioners have their permanent office in Washington, D.C. They review the judgments entered by the administrative law judges. The judgments of the Commission are appealable to the United States Courts of Appeal. The function of the Commissioners is, therefore, a purely adjudicatory one.

I am a graduate of Southern Methodist University law school. Since graduation, I have been in the private practice of law in Dallas, Texas. During this time, I have had the opportunity to try cases in all levels of state and federal courts and the

United States Court of Appeals. In addition, in the past 10 or 12 years I have specialized in the practice of Occupational Safety and Health Law and have handled OSHA cases before the federal OSHA Review Commission and State Review Boards under state approved plans. I believe my experience in the Occupational Safety and Health Area well qualifies me to serve on the OSHA Review Commission.

I believe that each case brought before the Commission should be decided on its individual merits and I pledge to this Committee that, if confirmed, I will carry out the duties of Commissioner with an open mind and with the intent to render fair and impartial judgments in each case that comes before me.

I would like to thank you Mr. Chairman, and the members of the Committee for this opportunity to express my views.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Rader (LAST) Robert (FIRST) B. (J.C.) Jr. (OTHER)

Position to which nominated: Occupational Safety and Health Review Commission Date of nomination: April 3, 1985

Date of birth: 11 (DAY) Sept. (MONTH) 1944 (YEAR) Place of birth: Cleveland, Ohio

Marital status: married Full name of spouse: Alberta June Cooley Rader

Name and ages of children:

Amy Paige	13	
Robert Zack	12	
Josh Daniel	10	

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Southern Methodist University Law School	1966-1969	Juris Doctor	May 1969
Harding College	1962-1966	B.A.	May 1966
Yorktown High School Yorktown, Indiana	1957-1962	Diploma	May 1962

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Debate scholarship, Harding College Debate Team
Pi Kappa Delta National Honorary Forensics Society
Phi Alpha Theta National Honorary History Society
Harding College American Studies Program
Vice-President, Harding Student Association
Who's Who In American Colleges and Universities
Partial Academic Scholarship at Southern Methodist University Law School
Who's Who In Texas, 1973
Outstanding Americans In The South
Outstanding Young Men of America, 1981

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Texas State Bar Association	none	1969 - present
District of Columbia Bar Assoc.	none	1982 - present
Association of Trial Lawyers of America	none	1981 - present
Phi Alpha Delta Legal Fraternity	none	1967 - present
Bar Assoc. of 5th Cir. Court of Appeals	none	1983 - present
Rotary International	Director (1983)	1979 - present
Lakeside Country Club	Director (1982-84)	1976 - present
Ennis Association for Retarded Children	Vice-President, Director	1980-1984
McCarty, Wilson, Rader & Nash	Director	1981 - present

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

March 79 - Present: McCarty, Wilson, Rader & Nash, 107 S. Gaines, Ennis, Texas 75119, Attorney

May 71 - March 79: Gibson's Discount Centers, Seagoville, Texas, Attorney

Sept.68 - May 71: Story, Armstrong & Steger, 4100 Republic Bank, Dallas, Texas, Law Clerk, Associate

Sept.66 - Sept.68: Town North YMCA, 4332 Northhaven, Dallas, Texas, Maintenance, Office and Youth programs

Government experience

List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

none

Published writings:

List the titles, publishers and dates of books, articles, reports or other published materials you have written.

"OSHA Warrants And The Exhaustion Doctrine: May The OSHA Review Commission Rule On The Validity Of Federal Court Warrants?" 84 Dickinson Law Review 567 (1980)

"OSHA Warrants And Administrative Probable Cause" 33 Baylor Law Review 97 (1981)

"The Employers' Rights and Options Under OSHA" Copyright 1981, Robert E. Rader, Jr.

"How To Handle An OSHA Case: An Employer's Rights and Options" 33 Baylor Law Review 493 (1981)

"Employers' Rights On Inspections Under OSHA Law" Safety Law, A Legal Reference For The Safety Professional, American Society of Safety Engineers, 1983.

Political affiliations and activities:

List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

I have held no offices in either political party or any election committee. I have served as a volunteer in campaigns for republican candidates for state judge (Virgil Mullenax) and for state representative (Tommy Meade). I also served as a volunteer in Phil Gramm's campaign for the U.S. Senate in 1976. I have made campaign contributions to both republican candidates (Joe Barton, U.S. Rep.; Phil Gramm, U.S. Senate; Bill Clements, Gov.) and to democratic candidates (Phil Gramm, U.S. Rep.; Mark White, Texas Attorney General). I no longer have records of the amount of contributions but recollect that contributions for Joe Barton totalled less than $300.00 and total contributions for Phil Gramm over the last ten years amount to less than $1,000.00.

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

Yes.

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

No.

3. Has a commitment been made to you for employment after you leave Federal service?

No.

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Yes.

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

The only potential conflict of interest would be any case that I have handled as attorney for a litigant before the Review Commission where that case is still pending before the Commission.

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

Recuse myself from the case.

The CHAIRMAN. All right, let me begin. I have a few questions that I would like to ask, and then I will turn to Senator Metzenbaum.

A cursory review of your record would indicate that in your law practice, you have represented companies subject to the Occupational Safety and Health Act. In other words, your experience with the OSHA Review Commission has been an advocate of business. I do not think anybody doubts that.

Do you feel since your recess appointment that you have been able to handle the cases before the Commission in an objective and impartial manner, even though you have been on one side of the matter before you came here?

Mr. RADER. Yes, I do. I would not have accepted the appointment if I did not think that I could do that. I would like to say that in the OSHA area, you either represent private employers, or you work for the Government and represent the Department of Labor. You do not really have a choice about who you represent.

I have represented employers. I have been an advocate for them. But since I have been on the Commission, I think our case decisions reflect that we have been objective in reaching our decisions based on what the law is.

Several times, I have thought that the interpretation of a particular standard was not one that I would prefer, but have voted to uphold that interpretation because that is what the courts and that is what the Commission said the law was. This is an adjudicatory position, and I approach it in that manner.

The CHAIRMAN. Well, thank you. Mr. Rader, I understand you were the attorney of record in the *Gibson Products Co.* case, which held that OSHA could not conduct a warrantless inspection if the company objected.

The Supreme Court adopted this position in *Marshall* v. *Barlows, Inc.*

Would you comment on the Supreme Court's decision?

Mr. RADER. Well, I think it was right.

The CHAIRMAN. I do, too.

Mr. RADER. The *Gibson Products* case was the first case that questioned whether the Department of Labor should get a warrant and conduct an inspection of a nonpublic portion of an employer's workplace, when the employer requested a warrant.

At that time, I was counsel to Gibson's Discount Centers. Mr. Gibson asked us to raise that issue and fight that case, and we did, and we had a three-judge panel which agreed that we were entitled to have a search warrant.

Subsequently, there was a case in Idaho involving a guy named Bill Barlow—and as you know, in the law practice, Mr. Chairman, once you do something that nobody else has done, you are an instant expert—and so subsequently, Bill Barlow called me and said, "How did you do it? I have a case up here. Would you help me?"

I sent him briefs, which his local lawyer used in his case. His case went directly to the Supreme Court, and the Supreme Court confirmed what we thought should be the rule, and that is that the Constitution applies to the Secretary of Labor just like it does to everybody else.

The CHAIRMAN. So in essence, what you did was as an advocate for your client, you helped to establish a rule that the Supreme Court ultimately upheld.

Mr. RADER. That is right.

The CHAIRMAN. What do you instruct your clients to do—when you were in practice—when OSHA seeks to conduct an inspection under a valid warrant?

Mr. RADER. Well, I do not tell them to do anything. I suggest to them that if it is a valid warrant, it is pretty risky to refuse to honor the warrant, because they stand the risk of being held in contempt.

The CHAIRMAN. So basically you are telling them to comply with the warrant; that is your recommendation?

Mr. RADER. Well, the choice is always theirs—yes, but the choice is always theirs. I tell them, "It is a valid warrant. If you do not abide by it, you are going to be held in contempt."

The CHAIRMAN. So your recommendation as a lawyer is to abide by it?

Mr. RADER. That is right.

The CHAIRMAN. OK. There have been some questions raised concerning your representation of the B.B. Andersen Construction Co. in 1981.

Tell us a little bit about that case.

Mr. RADER. Well, that case involved an inspection of a worksite in Arkansas City, KS——

Senator METZENBAUM. I am having a little trouble hearing you, Mr. Rader. Would you pull the mike a little closer, please?

Mr. RADER. I am sorry, Senator.

The company had been inspected two or three times in the previous 2 months. They had an employee who was laid off, was disgruntled, filed a complaint with OSHA. OSHA got a warrant that was an illegal warrant; they came out to do an inspection. They did not follow the procedures that are outlined in the act itself. The company questioned the reasonableness of the inspection since they had just been inspected and since the warrant was not a valid warrant, since the compliance officers had not followed the dictates of the law. They told the compliance officers that they wanted a court hearing on the warrant.

The compliance officers then proceeded to conduct an inspection by force, contrary to their own internal regulations.

So you had a situation where they conducted an illegal inspection based on an illegal warrant, in violation of the specific provisions of the act itself and in violation of their own internal regulations.

Mr. Andersen contacted me, or rather, his local lawyer contacted me and asked me to bring a case in Federal court for an injunction because these inspectors said they were going to come back out and reinspect within 10 days. He wanted a hearing in Federal court, to tell his story to the judge, to determine whether in fact the warrant was valid and whether his inspection was valid.

We filed an action in Federal court for a declatory and injunctive relief. The Secretary of Labor appeared and said, "Well, Judge, since the warrant has already been executed, they have to exhaust

their administrative remedies. They have to litigate these matters before the OSHA Review Commission."

The judge agreed, dismissed the lawsuit—even though the inspection had been by force. After he had dismissed the lawsuit, the Secretary's lawyer called up the lawyer in Kansas and said, "Well, guess what, we are not going to issue any citations, so you do not have any administrative forum in which you can raise these matters or have any hearing at all."

We subsequently, then, appealed the case to the Tenth Circuit Court of Appeals.

That is, in broad outline form, the case. I can take as long as you would like, Mr. Chairman, and fill in details.

The CHAIRMAN. No; that is fine. But it has been alleged that OSHA decided not to issue 12,000 dollars' worth of citations against Mr. Andersen as a result of political pressure brought against the agency by you and your client.

Is that true?

Mr. RADER. No. As a result of this inspection, Mr. Andersen had written a number of letters to various Senators and Congressmen, some Senators on this committee, I believe, and there was some Congressional interest in the case. I was contacted by Congressman George Hansen, who had helped raise money for the *Barlows* case to the Supreme Court, and he asked——

Senator METZENBAUM. Just a minute. Will you put this witness under oath?

The CHAIRMAN. Yes. We probably should have done that. Would you mind—do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. RADER. I do.

The CHAIRMAN. And I presume that all of your prior testimony, you will consider under oath, as well?

Mr. RADER. Yes.

The CHAIRMAN. OK.

Senator METZENBAUM. Your presumption is not enough, Mr. Chairman. Would you ask him that specific question, whether or not he agrees that his prior testimony is to be considered as under oath?

The CHAIRMAN. Yes.

Mr. RADER. Yes, I agree.

The CHAIRMAN. OK.

Now, go ahead and answer that question.

Mr. RADER. The reason I know Mr. Andersen had written all these letters is because he sent me copies of them. He had written Congressman Hansen. Congressman Hansen contacted me, asked me for details on the case. I told him over the phone what the case was about. He asked me to write him a letter, setting forth the details of the case so he could take the matter to Thorne Auchter, who at that time was an Assistant Secretary for OSHA.

I had no further contact with anybody, any Congressman, or Thorne Auchter, or anybody else.

The CHAIRMAN. Did you or your client have any idea that OSHA planned to issue citations as a result of the inspections?

Mr. RADER. No, we really did not. The only thing we knew was that as soon as our district court action was dismissed, within a

week the lawyer for the Secretary called and said, "There will not be any citations," which meant that we had no forum anywhere, no administrative forum, no district court forum, in which we could raise these constitutional matters. So at that time Mr. Andersen, who was frankly pretty hot about the whole deal, said, "What can I do?"

And I said, "The only thing you can do is appeal the district court's dismissal to the tenth circuit."

And he said, "Let us do it."

The CHAIRMAN. OK. I have before me a copy of a letter from the then Assistant Secretary of Labor for OSHA, Thorne Auchter, addressed to B.B. Andersen, dated July 28, 1981, which concludes, quote,

> In this particular case, even though OSHA's prohibition against the use of force was not violated, the circumstances were not such that OSHA was justified in conducting the inspection over the Superintendent's objections.
>
> The usual procedure of having recourse to further judicial proceedings would have been more appropriate. We therefore regret that this incident occurred and consequently have reemphasized the agency's policy to all field personnel. No departure from it is authorized without express National Office approval.

I would, without objection, put a copy of that letter in the record at this particular point.

Senator METZENBAUM. That letter is from whom?

The CHAIRMAN. That is a letter from Assistant Secretary for Occupational Safety and Health, Thorne Auchter, to the president of B.B. Andersen Companies, Inc.

[The document referred to follows:]

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 28 1981

B. B. Andersen, President
B. B. Andersen Companies, Inc.
P.O. Box 1692
Topeka, Kansas 66601

Dear Mr. Andersen:

Thank you for your correspondence regarding the difficulties which you have experienced in connection with various recent OSHA inspections. I have now become thoroughly familiar with the facts of your case and offer the following reply.

B. B. Andersen Construction Company has received nineteen inspections since 1971. Seven of these have been conducted since October, 1978, and four since November, 1980. Three of these four were complaint investigations required to be performed under the agency's complaint procedures currently in effect.

As for the January 20, 1981, inspection specifically, the complaint procedures established in OSHA Instruction CPL 2.12A were exactly adhered to. The status of the complaint was thoroughly discussed by telephone with Mr. Jim Tinkum on the morning of the inspection. The company then decided to allow the inspection.

Although the compliance officer was at the site for four hours, actual inspection time was just over three hours. While it is true that the lower portion of the trench was in rock, the upper five or six feet were in soil. Since measurements and employee interviews were necessary, this inspection time does not appear greatly excessive.

As for the inspection conducted on April 1 and 2, 1981, a valid administrative warrant had been obtained prior to attempting the inspection. The magistrate granting the warrant had examined the complaints and their validity and had decided that OSHA had shown adequate cause. The District Court, in responding to the company's petition for injunctive relief, ruled that the magistrate had acted correctly.

The reason that OSHA sought a warrant before going to the worksite was that the company had made it clear that it was going to require warrants for future inspections and in fact had required them for two of the three most recent OSHA inspections. When a valid warrant has been issued by a neutral magistrate, we expect that it will be honored. As a matter of policy, however, OSHA declines to use force to carry out an inspection when the employer objects even if a valid warrant has been obtained.

In this particular case, even though OSHA's prohibition against the use of force was not violated, the circumstances were not such that OSHA was justified in conducting the inspection over the superintendent's objections. The usual procedure of having recourse to further judicial proceedings would have been more appropriate. We, therefore, regret that this incident occurred and, consequently, have re-emphasized the agency's policy to all field personnel. No departure from it is authorized without express National Office approval.

Sincerely,

Thorne G. Auchter

Thorne G. Auchter
Assistant Secretary

The CHAIRMAN. Now, is this the response you referred to previously?

Mr. RADER. Yes.

The CHAIRMAN. Did you have any personal contact with Thorne Auchter on this case?

Mr. RADER. No.

The CHAIRMAN. Did you have any contact with any trade association regarding this case?

Mr. RADER. Well, yes. Let me give you a little background on that. The Associated General Contractors of Kansas was vitally interested in this case. They had a fellow named Jim Reardon who was the executive director who counseled contractors in Kansas on OSHA matters. And when this case occurred, he wrote a very long letter to Mr. Auchter. He talked to me about the case on several occasions, and he generally tried to get the AGC in Kansas to support the case.

He left the AGC, and a guy named Tom Slattery took over for him.

Now, with this background, later in the case, after the case was before the Tenth Circuit Court of Appeals, the lawyer for the Secretary of Labor called me and said, "Can we settle the case?"

I said, "Well, what are your terms?"

And he said, "You drop your appeal."

Well, I conveyed the settlement offer to Mr. Andersen. Keep in mind, now, this is, I am going to say, 8 or 10 months or maybe a year later, after the original case was filed. I conveyed the offer to Mr. Andersen, and Mr. Andersen at that time was beginning to be concerned about the cost, about the amount of the expense that he had put into the case. I am sure every lawyer has had this, where a client starts off in a case, and they are real gung-ho, and then a year later, they say, "Well, how much more is it going to cost me?"

And I told him at that time that we had filed our brief in the 10th circuit, the only remaining cost would be possibly a reply brief and oral argument.

On the phone with us at the time was the vice president of his company, a guy named Jim Tinkum. And he said, "Well, Jim, why don't you contact the AGC—they have been so gung-ho on this case—and see if they want to contribute some money to the case."

So with that, the telephone conversation ended. Subsequently, Tom Slattery from the AGC called me and he said, "Hey, Jim Reardon has left. I do not know anything about the case. Bring me up-to-date on the case," which I did.

He then said, "Well, write me a letter that I can take to my board of directors. I want to support the case. I think we ought to support the case. Write me a letter that I can take to our board of directors to get some money to support Mr. Andersen in the case."

I do not know whether they contributed to the case or not. I do know that Jim Tinkum subsequently contacted me and said, "Mr. Andersen says let us go ahead with the case."

To that extent, yes, I did have dealings with the AGC.

The CHAIRMAN. OK. Let me read to you from a 1984 article in the Kansas City Star which discussed the *B.B. Andersen* case.

Quote, "He"—meaning you, Mr. Rader—"said that prior to the time a decision was made not to proceed with the citations, he had

continued to push the case at his own expense after Mr. Andersen lost interest."

Is that statement accurate?

Mr. RADER. No.

The CHAIRMAN. OK. We will just put the article into the record at this point without objection.

[The document referred to follows:]

# of OSHA faces probe

FBI seeks to learn if favoritism played role in jobsite case

By Mike McGraw
staff writer
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The FBI is investigating President Reagan's former chief of workplace safety to determine if favoritism was involved in an agreement to drop proposed federal fines against a Topeka firm he now heads.

Thorne G. Auchter, who resigned last month as director of the Occupational Safety and Health Administration (OSHA), starts his new job this week in Topeka with B.B. Andersen Companies Inc., a Topeka-based group of development and construction companies. He eventually is scheduled to work in a Kansas City office of the firm.

The FBI probe was confirmed by federal officials close to the investigation and by Vernon Strahm, a retired Labor Department official who said he was interviewed last week about the matter by FBI agents.

The Kansas City Star reported on March 11—several days after his resignation announcement—that Mr. Auchter had participated in the decision to drop proposed fines against a subsidiary of Andersen Companies.

Recent interviews and documents obtained by The Star shed new light on the events surrounding a controversial 1981 inspection at the B.B. Andersen construction site in Arkansas City, Kan. Mr. Strahm was the Kansas City regional administrator of OSHA at the time.

The FBI referred inquiries to the U.S. Attorney's office here, which in turn referred inquiries to officials of the Public Integrity Section of the U.S. Department of Justice. Officials there refused comment.

Mr. Auchter and company owner B.B. Andersen, a prominent Republican donor, have vigorously denied any connection between the dropping of $12,580 in proposed federal safety and health fines in 1981 and the former OSHA chief's new job. He will serve as president of B.B. Andersen Companies Inc.

"I didn't know B.B. from Adam's house cat" at the time the fines were dropped, Mr. Auchter said in a recent interview.

Mr. Auchter, who made sweeping changes in the job safety and health agency during his three-year tenure, has said the proposed penalties were dropped for good reason.

He said two OSHA inspectors who discovered 12 allegedly serious or life-threatening safety violations on the Andersen jobsite in Arkansas City broke OSHA policy by entering the workplace over employer objections, even though

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they had a warrant. He also said that promoting good relationships with employers outweighed the benefits of issuing citations, and that his actions in the case were consistent with a new, non-confrontational philosophy at OSHA.

In a lawsuit that grew out of the case, a top OSHA official, John Miles, said in an affidavit that, despite OSHA's belief that inspectors acted properly, and despite the "extreme gravity" of the violations a decision was made, after consulting with Mr. Auchter, that due to the "appearance of impropriety" and OSHA's interest in improving relationships with employers, the citations would not be issued.

Mr. Auchter's view was much stronger. He has said that the inspection not only appeared to be improper but constituted a violation of OSHA policies.

Interviews and a review of documents recently provided to *The Star* by OSHA and Mr. Andersen tend to back up Mr. Miles' view of the incident. The information also indicates that:

- While company officials claimed physical force was used by OSHA inspectors to enter the jobsite, those inspectors entered peacefully, according to their report. Records also indicate the inspectors were intimidated by company officials and that one became so nervous he could not steady his pen to take notes.
- Despite Mr. Auchter's insistence that OSHA policies were blatantly violated in the inspection, agency officials involved in the incident followed what they said they knew to be proper policy at the time, according to their reports.
- The dropping of the proposed fines was a direct result of political pressure generated by Mr. Andersen and his attorney in the case, according to a federal judge who wrote an opinion in the case.
- During attempts to apply legal and political pressure, Mr. Andersen said, he wanted to avoid embarrassing Mr. Auchter. He said he did not want to embarrass any government administrator because, "once you do, you've created a hell of an enemy."

The new information also provides a chronology of the case that sheds new light on the actions of the participants:

The Inspection

On April 1, 1981, OSHA inspector Jimmy Campbell and a colleague showed up at an Andersen Co. construction site to check employee complaints of safety violations. They brought a warrant because of previous company refusals to allow entry without one.

According to Mr. Campbell's handwritten notes on the inspection, which contained several blanked-out sections that OSHA officials said were not public information, Andersen employees resisted the inspection despite the warrant. The inspectors said they were told by their immediate supervisors in Wichita to proceed with the inspection "until we were physically threat[illegible] entry.

Mr. Campbell proceeded, however, and noted that it was clear the company had worked to correct potential safety violations found the previous day.

Company officials followed the inspectors, taking notes, taking pictures of their activities and allegedly threatening employees who spoke with the inspectors, according to Mr. Campbell's notes. Their report noted, for instance, that an employee who they asked to show them around the jobsite, was told by his boss that if he did so he would not be paid.

Then, Mr. Campbell wrote, the company's safety officer approached him and, "placed himself in a physical position of attention with clinched fists. His face was red and angry with his teeth bared."

Mr. Campbell said the official's intimidating manner resulted in a "rapid heartbeat and a nervous hand that made it difficult to write my notes . . . ." He reported that, due to the official's anger, he felt it "highly advisable to depart the area," adding that, had he refused, "physical violence may have resulted."

The inspectors later recommended that the company be cited for serious safety violations and noted that the investigation documented the company's "willful disregard for job safety."

Among the 12 alleged violations: a lack of safety lines, unguarded power tools and protruding reinforcing bars that could impale a worker in the event of a fall.

Company Response

On April 10, 1981, the company filed suit in U.S. District Court challenging the legality of the inspection and attempting to block any penalties. A week later the judge in the case refused to issue an injunction and the next month he dismissed the complaint in a decision that was later upheld by the 10th Circuit U.S. Court of Appeals. There was no further appeal of the case.

On April 16, 1981, Mr. Andersen's attorney, Bob Rader, an expert on OSHA law from Ennis, Texas, protested the inspection in a letter to Rep. George Hansen, an Idaho Republican who founded a "stop-OSHA movement."

Mr. Hansen, who was convicted earlier this month of filing false financial disclosure forms, protested the company's treatment in letters April 20, 1981, to Mr. Auchter and his boss, Labor Secretary Raymond Donovan.

With his protests, Mr. Hansen "wrung" from the government a personal apology from Mr. Auchter to Mr. Andersen and a decision against issuing citations, a judge in the legal dispute later wrote.

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Mr. Rader said in a recent interview, however, that if the citations had been issued and remained in force he could have taken the case to a higher court to push for a new, more restrictive legal precedent limiting OSHA inspections.

He said that prior to the time a decision was made not to proceed with the citations he had continued to push the case at his own expense after Mr. Andersen lost interest.

On April 27, 1981, Mr. Strahm, the former OSHA regional director, wrote a memo to top OSHA officials in Washington outlining his actions in the case and noting that they were in line with previous instructions from Labor Department lawyers.

In a recent interview, Mr. Strahm said OSHA's treatment of the Andersen company after the proposed citations were dropped "can best be characterized as kid-glove treatment." Mr. Strahm said FBI agents asked him to describe the sequence of events surrounding the decision.

On May 13, 1981, government records show, OSHA's national office ordered local officials not to issue citations in the case "due to legal problems related to warrant/entry procedures." Mr. Miles, OSHA's field coordinator who works in Washington and supervised Mr. Strahm, agreed that an inspection of Andersen "should not be pursued at this time."

On June 14, 1981, Mr. Hansen issued a press release taking credit for "sweeping and unprecedented policy changes" growing out of the incident. He said the changes, which Mr. Auchter insists were in place prior to the Andersen incident, put an "immediate end to forced-entry inspections."

On June 30, 1981, Mr. Auchter informed Mr. Strahm—who later retired from OSHA rather than accept a demotion resulting from allegations that he broke federal hiring practices in a separate case—that his actions in the Andersen case embarrassed the agency. The rebuke, contained in a draft of Mr. Strahm's evaluation, said his actions also resulted in "strained relationships" with the company involved. Mr. Strahm said he never received his final OSHA evaluation.

On July 28, 1981, Mr. Auchter wrote Mr. Andersen a letter of apology saying that, even though OSHA rules were adhered to by the inspectors, the inspection was not justified, given the company's objections. "We therefore regret that this incident occurred . . . ," Mr. Auchter wrote.

On Feb. 8, 1982, before the company's legal appeal was rejected, Mr. Rader wrote a letter about the case to officials of the Associated General Contractors (AGC) of Kansas Inc. in Topeka. He asked that they encourage Mr. Andersen, who said he had lost interest in pursuing the case, to proceed with it.

His letter said the case presented a "rare opportunity . . . that will significantly restrict OSHA in the future." He noted that, if he succeeded in court, employers could force hearings on search warrants issued by federal judges before OSHA could inspect.

He added, "I know Mr. Andersen does not want to embarrass Thorne Auchter. However, I am more inclined to think that if anyone will be embarrassed it will be the Solicitor." The solicitor of labor is the Labor Department's top lawyer.

He also noted, "Thorne Auchter will not always be Assistant Secretary of Labor for OSHA . . . The time to make precedent is when we have a good case."

The CHAIRMAN. You have been quoted in the past, Mr. Rader, as advocating efforts to restrict OSHA. Were you attempting to restrict implementation of the Act or improper enforcement techniques utilized by agency staffers?

Mr. RADER. I think my record is really pretty clear that my efforts have been directed toward what I think has been abusive law enforcement. Particularly in the warrant area, we have fought the battle to have the Supreme Court say that the Constitution and the fourth and fifth amendments apply to the Secretary of Labor just like they apply to everybody else.

The CHAIRMAN. Well, that is what attorneys do, isn't it?

Mr. RADER. That is right.

The CHAIRMAN. Their job is to defend clients, or bring cases on behalf of clients, at least trial attorneys and certainly attorneys in this area; is that right?

Mr. RADER. Well, that is certainly my view.

The CHAIRMAN. And sometimes you are on the opposite side of OSHA; is that right?

Mr. RADER. Well——

The CHAIRMAN. In fact, most of the time you have been on the opposite side.

Mr. RADER. You have to be on the opposite side unless you want to work for the Department of Labor. And I was in private practice, so I could not represent anybody but business.

The CHAIRMAN. And do you feel that you conducted your law practice in this regard, with regard to OSHA matters, in an ethical and reasonable and good, legal-like way?

Mr. RADER. I certainly do.

The CHAIRMAN. Do you feel like you represented your clients well?

Mr. RADER. Well, I hope so. I think I did.

The CHAIRMAN. Do you believe in the OSHA laws?

Mr. RADER. I would not have accepted the appointment if I did not think that I could uphold the law.

You know, Senator, I have been at workplace fatalities. I mean, I have seen squashed bodies and the blood on the ground. And you do not just look at that and walk away and say, "I do not care about safety and health in the workplace."

I spent 90 percent of my time in private practice advising clients how to comply with the Occupational Safety and Health Act. Those are the things, of course, you do not hear about; those do not make the papers.

But I firmly believe in occupational safety and health.

The CHAIRMAN. And if you are confirmed in this position, you will do everything in your power to enforce the law?

Mr. RADER. That is correct.

The CHAIRMAN. And everything in your power to make sure that the law is utilized in favor of the workers and others who might be injured or suffer any kind of problems as a result of occupational unsafe conditions?

Mr. RADER. That is correct.

The CHAIRMAN. All right.

Let me turn to Senator Metzenbaum.

Senator METZENBAUM. Senator Hatch asked you if you believed in the OSHA law, and I do not think you answered him on that. I think you said that, "I feel I can enforce the law," or something of that kind.

The CHAIRMAN. He said that he would not have taken this position if he did not believe in the law.

Senator METZENBAUM. Well, let us let him answer. I did not interrupt you, so let me just inquire of him.

The CHAIRMAN. All right. Well, let us not misstate what he says either, Howard. Let us be fair about it.

Senator METZENBAUM. Well, just let me ask it.

Do you believe in the law?

Mr. RADER. I believe in occupational safety and health.

Senator METZENBAUM. That is not my question.

Mr. RADER. I am not going to lie to you, Senator. If I were drafting the law in a vacuum, I would not have written—there are some sections in there that I would have written differently.

But since I have been on the Commission, I have voted, and if you have read my decisions, you will see that I have voted to uphold the law based on what the courts and the Commission precedent have been. And as I say, there is not any question that I believe in occupational safety and health.

Senator METZENBAUM. Has your client ever removed or replaced you as counsel in a warrant case?

The CHAIRMAN. Do you mean any client?

Senator METZENBAUM. Yes.

The CHAIRMAN. Any client.

[Pause.]

Mr. RADER. I cannot think of a case where they have.

Senator METZENBAUM. You cannot think of a case where they have. Do you recall a warrant case in Kentucky you handled in 1982?

Mr. RADER. What was the company?

Senator METZENBAUM. The company was—I do not have the company's name. You have no recollection?

Mr. RADER. I have handled cases in Kentucky.

Senator METZENBAUM. Let me read you a letter I received yesterday from the general counsel of the Labor Cabinet for the State of Kentucky.

Dear Senator Metzenbaum, this is in response to an inquiry from your office regarding this agency's contact with attorney Robert Rader.

On May 18, 1982, the Kentucky Occupational Safety and Health Program, Division of Compliance, attempted to gain entry to a place of employment for the purpose of conducting a general schedule safety inspection.

The compliance officer was refused entry, and a search warrant was obtained. When the warrant was presented, entry was again denied upon advice of counsel, Mr. Robert Rader.

Without knowing anything about the selection process for general schedule inspections, our selection method was challenged by Mr. Rader as not being a "worst first system."

And then it goes on to say, "Worst industries inspected first."

The employer was held in contempt for its failure to honor the warrant, and fined $1,000 per day for 18 days. The contempt order was appealed.

Shortly after the contempt order was appealed, the Division of Compliance received a written complaint from an employee of the same employer. The allegations contained in that complaint were as follows:

Two employees have had their fingers cut off, one on a cutter and one on a printing press. Approximately 12 people are exposed to this equipment. No new safety devices have been installed to protect employees from these hazards.

That is the end of that quote.

The letter continues to read,

Our workers' compensation files, containing reports submitted by this employer, reveal that on May 14, 1981, one of its employees suffered amputation of the left thumb and left index finger while working on a cutter, and that on May 13, 1982, another of its employees suffered a left hand mashed and thumb partially severed while working on a web printing press.

The complaint was promptly assigned to a compliance officer who presented the complaint, and then it says, (absent complainant's identity), to the employer.

Entry was again denied, and a search warrant was obtained. Again the warrant was not honored upon advice of counsel, Mr. Robert Rader. This time, the "worst first" challenge could not be made, because there was a complaint investigation. Therefore, the jurisdiction of the court to issue a warrant was challenged.

Appeals of these cases lasted through the winter until January of 1983, when the employer obtained different counsel. Both cases were promptly settled in February, and inspection without prior notice was allowed.

I am not suggesting that an employer should be denied any rights guaranteed under the Constitution. I am suggesting that those rights be exercised in good faith and not for purposes of hindrance or delay.

It cannot be denied that according to the information available to this agency and to the employer, an inspection was warranted and necessary. Yet it took almost a year to finally gain entry.

Attached hereto are two articles authored by Mr. Rader which appeared in the Baylor Law Review. They are entitled, "How to Handle an OSHA Case" and "OSHA Warrants and Administrative Probable Cause". Given the tenor of these articles, Mr. Rader's ability to serve without bias and partiality should be given the utmost scrutiny.

Federal Review Commission cases are not binding precedent for the Kentucky Review Commission. However, they are very persuasive, and are routinely cited by and to it. This agency is concerned that the members of the OSHA Review Commission be comprised of members who have compassion and concern for the working men and women of this nation.

I hope that this information may be helpful to the Committee.

Sincerely, Betty A. Springate, General Counsel, with a copy to Secretary John Calhoun.

Mr. Rader, the General Counsel voices some very serious concerns about your commitment to the whole question of worker safety. How do you respond?

Mr. RADER. Well, first of all, Senator, that case was for a company called Ennis Business Forms—or, strike that—it was a subsidiary of Ennis Business Forms, I believe. And we changed local counsel in the case.

What had happened was they had gotten a warrant—the Kentucky statute specifically says that the warrant should issue from a specific court—and they had gotten the warrant from the wrong court, and because frankly, I did not know anything about Kentucky law, and the local counsel really kind of got us fouled up in the case, the case did get bogged down. We had two or three things going in two or three courts. So, finally, we just dismissed that counsel, and we got other counsel, and the inspection was conducted.

Senator METZENBAUM. I do not think you have responded. The question is, you were the counsel in the case. You hired local counsel—not an unusual procedure. The question is, she is charging and indicating that here were people losing their fingers, losing parts of their hands. They wanted to go in and do an inspection. You used delaying procedures in order to keep the inspection from taking

place, and then when they changed counsel, they immediately thereafter worked out an easy settlement, and there was no problem.

How do you respond to that?

Mr. RADER. Senator, that is the typical position that we encountered in these cases. If we had a question about an inspection warrant or an inspection program, you understand, Senator, that the only way you can obtain a court hearing is to refuse to honor the warrant. Now, I do not like that. In fact, I fought against that legal principle early in the warrant cases. My position was you ought to be able to allow the inspection, go back into the court and file a motion to suppress the evidence, as in a criminal case.

The Secretary of Labor, however, took the position that once the warrant was executed, you could not go back into the court that had issued the warrant. The only way you could be assured of a court hearing was to refuse to honor the warrant.

So therefore, the employer is in a very tenuous position to start with. When an employer comes to me and says, "We do not think this inspection request is fair. How can we get a court hearing on it?" I explain the options, and I tell him, "Now, the choice is yours. But you understand that if you refuse to honor this warrant and you are wrong, you may be held in civil contempt."

Now, in every case that I have had that I can think of, when the employer has decided to resist the warrant in order to get a court hearing, we have approached the counsel, whether it was the Secretary of Labor's counsel, whether it was the attorney general in a State plan, and we have said:

> Look, let us set this matter before the court by agreement. Let us do whatever discovery or preliminary matters we need to do by agreement. Let us go to the court on cross-motions for summary judgment. Let us dispose of the case quickly.

In every case, whether it be the Solicitor or the attorney general, they have opposed, using every procedural grounds available, and the fact is that the reason these cases have been delayed is because of the delaying tactics of these people, not because of our delaying tactics.

I had a case before the Virginia Supreme Court in which they asked me this question. They said, "Doesn't all this challenge to the warrant delay the inspection?"

My answer to that was, "It does, but that is not our fault." We have fought against that principle of law; in every case we have offered to go foward with the case as quickly as possible.

Senator METZENBAUM. But Mr. Rader, you seem to miss the point. You are up for confirmation to be a member of the OSHA Board. You have spent a good deal of your legal activities fighting inspections. In this case, there was a contempt citation, $18,000 in fines assessed, which I think was subsequently wiped out by having the matter worked out. But the fact is, it is your approach that concerns those of us concerned about occupational safety and health.

Why? What difference does it make whether the warrant was issued here or there? What difference does it make, if all they are coming in to do is to do an inspection and provide some concern for the employees? And you spent your time telling these people how

to juggle around, in fact to the point where—you never have responded to me—as I understand it, you were fired by your client, and then they got new counsel, and they settled the case promptly.

Mr. RADER. No, that is not correct.

Senator METZENBAUM. What are the facts?

Mr. RADER. As I said, Senator, I was counsel throughout the case. We changed local counsel in the case. Now——

Senator METZENBAUM. Were you ever fired by your client in that case?

Mr. RADER. No.

Senator METZENBAUM. All that happened was they changed local counsel?

Mr. RADER. That is correct, that is correct.

Senator METZENBAUM. Did you know that two employees had their fingers chopped off by your client's machinery when you advised them for the second time to dishonor an OSHA search warrant?

Mr. RADER. I do not know. I do not remember that. I may have.

Senator METZENBAUM. Would that have been relevant to you in telling him whether or not to resist the warrant?

Mr. RADER. That would have been relevant to our working out the subsequent inspection.

Senator METZENBAUM. That is not my question. The question is, would that have been relevant to you in telling him to resist——

Mr. RADER. No, no.

Senator METZENBAUM. It would not have been relevant?

Mr. RADER. No.

The CHAIRMAN. Howard, would you yield for a second?

Senator METZENBAUM. Well, Senator Hatch, let me just say, Mr. Chairman, that you have a tendency in some of these hearings to want to be an apologist for the witness. Now, let me——

The CHAIRMAN. No. I have a tendency to want the witness to be treated fairly. He happens to be an attorney. He has an obligation to protect his client, even though you would disagree with him.

Senator METZENBAUM. You and I can argue about that, but——

The CHAIRMAN. Well, fine, but my gosh, you are an attorney.

Senator METZENBAUM [continuing]. But I am saying to you, Mr. Chairman, that I have a right to interrogate this witness——

The CHAIRMAN. Yes, but not ad infinitum. You have been going for half an hour.

Senator METZENBAUM. I intend to go for a lot longer than that.

The CHAIRMAN. And you will have the right.

Senator METZENBAUM. OK.

The CHAIRMAN. But there are other Senators here, too, and if we have to go to the 10-minute rule, we will go to it, but look——

Senator METZENBAUM. That is no problem with me.

The CHAIRMAN [continuing]. When a witness has a right to be an attorney, he has an obligation and an ethical duty——

Senator METZENBAUM. Are you his lawyer? He is a lawyer.

The CHAIRMAN. No, but I get tired of these inquisitions, Howard.

Senator METZENBAUM. Well, this is no inquisition. You are just sensitive about whether or not——

The CHAIRMAN. Every time you have any little idea—every Reagan nominee goes through this. We have gone through it ad in-

finitum on the Judiciary Committee, and we are going through it here, and I think it is crazy.

Senator METZENBAUM. Maybe it would have been——

The CHAIRMAN. And it is not fair, and it is not right. You are an attorney.

Senator METZENBAUM. Well, sure. But how about if it had been your brother or your child who had had their finger chopped off?

The CHAIRMAN. I am sorry that people get injured in industrial accidents. I believe in OSHA. But I will tell you something. An attorney has an obligation to represent his client—not represent you or anybody else, for that matter. And if he does it right and ethically, how can you find fault with it? And if he finds there is an injustice in the law, or there is a misuse of the law, he has an obligation to represent his client.

Now, all I say is we go through this with all these people, and because we are so evenly divided on these committees, it is always difficult to get people through. Here is a man who is answering things, I think, honestly. I may not agree with him on some of his OSHA approaches. But he says he is enforcing the law, he is fair in the law. If you can show he is not, then maybe I will change my viewpoint.

But gee whiz, let us not make it a star chamber thing, and let us not ignore the fact that an attorney has an obligation to uphold the law and represent his client, even though it may be distasteful at times.

Senator METZENBAUM. Mr. Chairman, I practiced law probably longer than you did, and I know what the obligations of an attorney are——

The CHAIRMAN. Well, I think you do. That is why I get so upset about it.

Senator METZENBAUM [continuing]. And I also know when it means going beyond the obligations and also possibly getting into areas that attorneys should not get into. So that, Mr. Chairman, if you have calmed yourself down——

The CHAIRMAN. Go ahead, go ahead.

Senator METZENBAUM. Maybe you ought to take a Sedoquil, because we have got a lot more to go with this.

The CHAIRMAN. I do not know what that is. Only you Democrats know that.

Senator METZENBAUM. Well, that is a Democratic medicine, Mr. Chairman.

The CHAIRMAN. I see. That is what I figured.

Mr. RADER. Senator, if I may add a comment——

The CHAIRMAN. All I want is the witness to be treated fairly, that is all. You can ask any questions you want, no matter how bad they may be, but I want him to be treated fairly.

Senator METZENBAUM. Mr. Chairman, how can I treat him fairly when you keep interrupting me?

The CHAIRMAN. I know, I know.

Senator METZENBAUM. If you just would relax and calm down; maybe Milltown would be good for you——

The CHAIRMAN. Let us just be fair, that is all.

Senator METZENBAUM. Now, did you want to say something, Mr. Rader, to get in-between the two Senators' discussion?

The CHAIRMAN. If you want to say something, Mr. Rader, maybe it is time you say it.

Mr. RADER. Yes, OK. As I sit here listening to your conversation——

The CHAIRMAN. We are really good friends. The problem is we differ on almost everything.

Senator METZENBAUM. He is just totally wrong about everything, that is all.

The CHAIRMAN. At least, from your perspective.

Mr. RADER. As I sit here listening, I remember more of the case, and my recollection of the case was that there were a number of instances where warrants had been issued by the wrong court, and some of the warrants were dismissed, and other warrants were upheld without hearings, and the company was held in contempt, and 18,000 dollars' worth of contempt penalties were levied, and it was just generally a mess.

And then they came out there again with a complaint inspection. My recollection is that we said, well, look, they have got a legitimate complaint. We ought to let them inspect, but we need to try to work out this deal so that we can get the 18,000 dollars' worth of penalties taken care of, too. So that was, I think, our approach in the case.

Senator METZENBAUM. Now, tell me, Mr. Rader, how it came that you chose different local counsel? Were you the one who made that choice, or your client?

Mr. RADER. Well, the first local counsel that we got had represented the client, I think, on other matters and had no knowledge at all in this area.

Frankly, they got us fouled up in the courts. They filed motions to quash—and I do not remember the details, but they got us in the wrong courts in the Kentucky State court system. And it was really a procedural nightmare. So subsequently in the case, I told the client, look, this is getting to be a bigger and bigger mess, and we are not accomplishing anything, and I suggested that we change counsel, and they agreed to that.

Senator METZENBAUM. Mr. Rader, you now have had a better chance to recollect. Do you remember now whether or not you knew that some employees had lost their fingers and parts of their hands at the time you told your client to resist the inspection warrant?

Mr. RADER. Well, if they came out there, Senator, with a complaint that someone had lost their fingers, I am sure that I asked the client if that was true. If they had lost their fingers, then I am sure they told me that that had happened.

At that point in time, as I say, we decided, well, they have got a legitimate request here to inspect, but let us see if we cannot, in agreeing to an inspection, work out a deal where these 18,000 dollars' worth of penalties are removed, the contempt penalties.

Senator METZENBAUM. Mr. Chairman, I have many more questions, but I heard you say something about a 10-minute rule, and I want to be fair to Senator Simon.

What is your pleasure?

The CHAIRMAN. I think we ought to give Senator Simon, who has been very patient here, some time, but I am happy to give you all the time you need.

Senator METZENBAUM. I have a considerably large number of questions to get into.

The CHAIRMAN. I understand.

Senator Simon.

Senator SIMON. Thank you.

First of all, Mr. Rader, I appreciate your saying you want to uphold the law and the court decisions and the Commission precedents.

You heard Senator Gramm say that you represent the viewpoint of the President of the United States on the Commission. What is the viewpoint of the President of the United States?

Mr. RADER. Well, Senator, when the White House called me and asked me if I would be interested in this appointment, my original inclination was to not be interested. But I did talk to them, and they said that they had been criticized in the past for nominating people without a background or experience in occupational safety and health.

They had a situation at the Commission where the Commission had not had a quorum for several months, had not been able to operate for several months. There was a backlog of cases some of which dated back to 1978. So they wanted someone who had a background in this area of the law who could step right in and hit the ground running, so to speak, to work on these cases, and they wanted somebody who would take what they called a commonsense approach to the enforcement of the act. I think that is probably the most accurate thing I could say.

Senator SIMON. Who was it from the White House who contacted you?

Mr. RADER. A young lady named Kathy Regan, who I think has since married, and I believe her last name is now Russo.

Senator SIMON. When Ms. Regan contacted you, and she said "a common sense approach," did she elaborate, or did you understand that means that we have got to shift a little more over and protect employers a little more, and the employees not so much?

Mr. RADER. No, I did not understand that. I just understood a common sense approach. You look at the facts, and you look at the law, and you apply a little bit of commonsense, and you rule.

Senator SIMON. But there was nothing said about any kind of a shift in Commission activity, in conversation with you?

Mr. RADER. No.

Senator SIMON. The Hartford Courant—I do not have the date—but it has an article by Mike McGraw, the labor editor, in which it says that you have—and I am quoting—"written extensively in favor of greater restrictions on OSHA inspectors' powers."

Is that an accurate description of what you have written?

Mr. RADER. I have written articles that take the viewpoint that OSHA inspectors should be bound by the prohibitions of the fourth and fifth amendments. If an employer requests a search warrant, they should be obligated to get a search warrant, based on probable cause. If they have promulgated regulations, they should be obli-

gated under the due process clause to abide by those regulations, so that everybody can predict how the game is going to be played.

To that extent, yes, I have advocated restrictions, the same restrictions that everybody else has to go by.

Senator SIMON. The same article says, and I am quoting from the article now, "After initially pushing a legal battle over the inspection, Andersen"—this is your client—"later said of Rader, 'I told him it was no deal for me. Rader was trying to use this case to make new law with, and I just didn't think it would make us any money in the end.'

"Rader then wrote a letter to the Associated General Contractors of Kansas, in which he said," and I am quoting, " 'I believe the case represents a rare opportunity to establish important Constitutional precedent that will significantly restrict OSHA in the future.' "

Now, my concern is, frankly, I do not want a Commissioner who wants to significantly restrict OSHA in the future.

I guess the first question is, is this an accurate quotation from your letter, to your recollection?

Mr. RADER. Well, I think there are really two things there that need to be addressed. First of all, Mr. Andersen never said, "Don't go forward with the case." I handled other cases for him in which he did say, "Listen, I do not want to go any further with this case. I want to settle it," and I said, "Fine," and we settled the case.

I would not and have never gone forward with a case where the client says, "I do not want to go forward with the case."

The second thing is, if you will hark back to what I said earlier about the Associated General Contractors, their concern was and the concern of this fellow named Jim Reardon, who was their executive director or vice chairman or whatever, was that apparently, there were a number of employees who would file complaints, and the inspectors would come out to inspect, and the employer would say, "Fine. If you want to inspect to see if those complaints are accurate, come ahead," and the inspector would say, "Well, since we are here, we are just going to inspect the whole jobsite."

The contractors resented that approach, and they were very interested—and I have correspondence in my heavy briefcase which substantiates that they were concerned and interested and had written letters to Thorne Auchter saying that, "When you come out there on a complaint, we do not mind you inspecting for the complaint items, but we think the inspection ought to be limited to the complaint items."

So the restriction in the letter that you are talking about, that has to be taken in the context of our previous conversations, which were that if this case were upheld, the principle of law that would be established was that if they had a complaint, their inspection would be limited to the complaint.

Senator SIMON. But what is your own personal viewpoint? In fact, should OSHA be able to inspect only this area—if it is this printing press in Kentucky that smashed someone's finger that they can only inspect that printing press and cannot look at the whole question of safety in that small plant?

Mr. RADER. Well, my personal viewpoint is that if they come out there to inspect on a specific complaint item, and the employer

says, "I don't mind you inspecting for this item, but I do not want to have to go around with you and go through an inspection of my entire plant," then my feeling is that the inspection should be limited to the complaint item. And if they get a search warrant, their probable cause is based on the complaint, and therefore if the warrant is broader than that, in my judgment, the warrant is not a constitutional warrant.

It would be like in your case, Senator, if—well, let me use my case. Let us say the police came to me and said——

Senator SIMON. I understand. If I may interrupt, I understand the principle of narrowing a warrant. But I am concerned beyond the technical question of the warrant, whether you think OSHA ought to be out there, trying to inspect and protect workers in this country. That is my concern. And I guesswhat I have not felt in this dialog is that desire on your part to protect those workers.

Mr. RADER. Well, I desire that workers be protected, but I also desire that the Constitution be followed. I do not think those things are contradictory.

Senator SIMON. I do not, either, but I think you will find some of us here hoping that the OSHA Commissioners in fact are going to be pretty zealous in a good sense in protecting workers.

Let me ask you one other thing in this connection. We were advised in my office by one person—I do not know whether it is true or not, and that is why I am asking you—that since you have been on the Commission, very few decisions have been made, but that all the decisions have leaned toward and have been in favor of the employer. Is that accurate, or is that not accurate?

Mr. RADER. That is not accurate.

Let me say first that I do not keep score, and I do not know of any judge who subscribes to the theory that there is an acceptable percentage range for which he has got to vote for one side or the other in a case. But I was advised that the Senators might be interested in the cases that we had ruled on so I checked the record.

Since I have been on the Commission, we have ruled on about 40 cases. I cannot, of course, discuss the ones that have not been published yet, because the opinions have not been drafted.

Of the ones that have been published, there are eleven cases that I have ruled on on the merits that were not procedural cases of one sort or another, that I got in on from the beginning. And in those cases, I voted to vacate citations in six of them and to affirm citations in five of them.

Senator SIMON. And if I follow what you are saying correctly, to vacate citations means to basically view in favor of the employer?

Mr. RADER. To accept their position, yes.

Senator SIMON. So that in—it is about a three-to-two—and I am not suggesting that as you decide cases, you keep this kind of statistic, but that is very roughly it.

Mr. RADER. Excuse me, Senator. Have you read any of the decisions that have been issued since we have been on the Commission?

Senator SIMON. I have not. I will ask my staff to get ahold of some, and we will do that. And let me ask, are they personally signed by you when a decision is——

Mr. RADER. No. The Commission rules on the cases in agenda meetings, and then the decision is drafted in the first instance by

members of our general counsel's office, and then the Commissioners review it, make changes and so forth, and sort of hammer out the language.

But I have practiced before the Commission for 10 or 12 years, and I really think that the decisions that have been issued since we have been on the Commission are very, very good. There are times where we differ, but these are cases that previous Commissions have not been able to reach a majority on since 1978. We are dealing with some very difficult issues, and I think we are issuing some very good opinions. I would encourage you to read them.

Senator SIMON. One final, brief area of questions, Mr. Chairman.

I have a letter that you sent to Congressman George Hansen. He is, you say in the first sentence, "As the founder of the 'Stop OSHA' movement, there is a flagrant case of OSHA abuse in Kansas that I think you should be aware of."

You start the letter, "Dear George" and sign it "Bob." Have you been involved in the "Stop OSHA" movement at all?

Mr. RADER. The "Stop OSHA" movement was kind of an advertising deal that Congressman Hansen started to raise money for the *Barlows* case to the Supreme Court.

Senator METZENBAUM. Would you bring the mike closer to you, please?

Mr. RADER. The "Stop OSHA" movement was sort of an advertising or a political gimmick that Congressman Hansen initiated as a vehicle to raise money for the *Barlows* case.

I consulted with the lawyers in the *Barlows* case. I wrote an amicus brief before the Supreme Court in that case, and as a consequence, had a number of contacts with Congressman Hansen.

Senator SIMON. Were you a part of the "Stop OSHA" movement?

Mr. RADER. Well, I do not know how you would be a part of it; I mean, you do not take memberships or anything like that.

Senator SIMON. But you worked with him on that case?

Mr. RADER. That is right.

Senator SIMON. And your amicus statement said what?

Mr. RADER. The amicus brief basically suggested first that the Supreme Court should affirm the court below that a warrant was required by the fourth amendment, and we concentrated on suggesting to the Court that they should outline what the Secretary should show to get such a warrant.

You see, this is where most of the litigation has been in this area. The Court said, "You have to get a warrant, but there is going to be a new test for probable cause. It is going to be different than the test in a criminal case." But they never told anybody what it was. And consequently, the courts have struggled with that.

Senator SIMON. You use twice in this letter the phrase, "inspection by force" in referring to OSHA. What do you mean by "inspection by force"?

Mr. RADER. Well, you understand first that I was not there at the jobsite. I have in my file handwritten notes that were made by the local counsel, Randy Forbes, in the case. And of course, I have talked to him and have talked to people who were with the Andersen Co. My understanding of the facts is that they came to inspect; the Andersen people said:

We do not think this is right. We want to go and have a court decide whether it is right. So please leave, and we are going to go down to the courthouse and file a motion to quash the warrant, and we will resolve the issue in court.

The inspectors said:

No. We are going to inspect.

And the Andersen people said:

Wait a minute. Your regulations say that even with a warrant, when the employer does not want you to inspect, that you should go to court to enforce the warrant, and we are asking you to abide by your own regulations.

The compliance officer said,

We do not care about that. We are going to inspect. And the only way you can stop us is to physically stop us. And if you physically stop us, you are subject to criminal penalties under Federal law.

They then proceeded to inspect.

Senator SIMON. Thank you, Mr. Chairman.

Senator METZENBAUM. Mr. Chairman.

The CHAIRMAN. Yes. Let me just mention one thing, and then I will turn to you again, Senator Metzenbaum.

One of the eleven cases that have been reported that you worked on was the *Cardinal Industries, Inc.* case. In that case you were the dissenter from the majority opinion.

Mr. RADER. That is correct.

The CHAIRMAN. And you held for the Department of Labor.

Could you describe that case for us?

Mr. RADER. Well, actually, there were two cases, Mr. Chairman—the *Cardinal Industries* case, in which I wrote a rather lengthy dissent; and then there was another case, I believe, called *Nuway Mobile Home*, in which I just referred to the previous dissent.

The case involved a company that made—I have forgotten now which was mobile home and which was components of apartment houses—but they made, I think, these components of apartment houses, maybe prefab parts of apartment houses, and they made them in a factory setting. And the employer contended that since they were engaged in building these sections of housing units that the construction standards should apply. And since the Secretary had not cited them under the construction standards, the citations should be vacated.

My view was that since they were making these in the context of a factory setting, that the general industry standards applied. The other Commissioners did not agree with me, so I was in the minority.

The CHAIRMAN. So you upheld the worker position in that particular case.

Mr. RADER. That is correct.

The CHAIRMAN. In both of those cases.

Mr. RADER. Yes.

The CHAIRMAN. Against the majority opinion. OK.

Let us turn back to Senator Metzenbaum. Senator Quayle is going to replace me so I can go over to the balanced budget amendment debate, and I am very grateful to him, so I would like to express that in advance. He will be here in just a few mintues.

So, forgive me that I have to leave but we will turn to Senator Metzenbaum at this time.

[Whereupon, Senator Quayle assumed the chair.]

Senator METZENBAUM. Mr. Rader, with respect to the Stop OSHA fund, did you contribute any money to it or receive any money from it?

Mr. RADER. I did not contribute any money to it. My recollection of the way that worked was that the "Stop OSHA" movement was done somehow in conjunction with the American Conservative Union to raise money for the *Barlows* case.

When I wrote the amicus brief in that case, the American Conservative Union paid me, so it is conceivable or possible that funds from that movement paid me for my services in the case.

Senator METZENBAUM. So that actually, we have before us a nominee who had either directly or indirectly—you are not quite certain which, as I gather your response—had received money from the Stop OSHA movement?

Mr. RADER. You have before you, Senator, a nominee who was hired by the American Conservative Union to write a brief to the Supreme Court and was paid for his services.

Senator METZENBAUM. Well, but I think you just said that whether it was through Stop OSHA or the American Conservative Union, the Stop OSHA movement itself did raise money, didn't they?

Mr. RADER. Yes.

Senator METZENBAUM. And are you representing to us that some of those moneys may have come to you, or that none of those moneys came to you, or that you do not know?

Mr. RADER. I do not know.

Senator METZENBAUM. Can you get us the records?

Mr. RADER. Well, I can get the records, I am sure, of the money that I got. I would show a bill and show that it was paid. That is all I would have. I do not know where the money came from. It came from the American Conservative Union. It was for doing a brief in the Supreme Court.

Senator METZENBAUM. And was the bill originally submitted to the American Conservative Union or to the Stop OSHA movement?

Mr. RADER. The American Conservative Union.

Senator METZENBAUM. How much was that for?

Mr. RADER. Well, that has been in 1977 or 1978. I am proud to say I have done a lot of bills since then, so it is hard for me to remember. I am going to guess in the $3,000 to $5,000 range.

Senator METZENBAUM. Will you obtain that information for us, please?

Mr. RADER. If I can. I do not personally have records that go back that far, and offhand, I do not know whether I would find it.

Senator METZENBAUM. Could you ask the American Conservative Union to check their records, please?

Mr. RADER. I will. Excuse me, Senator—do you want the amount of the check that they——

Senator METZENBAUM. The amount of the check, the date of the check, and a photostat of it, if it is available.

Mr. RADER. OK.

Senator METZENBAUM. In your opening remarks, you twice stated that in OSHA matters, you either represent employers or the Department of Labor. Is there not a third factor, is there not a third interest, the working men and women of this country, and don't

they have a concern about OSHA matters, and don't they oftentimes have representation?

Mr. RADER. Well, yes, they sometimes have representation where there is a union; they will have representation in a proceeding before the OSHA Review Commission. Actually, in our part of the country, those are very rare. You certainly could not make a living doing that.

Senator METZENBAUM. Well, that was not the point. You indicated that it is just management and OSHA, and that those are the only two parties.

Mr. RADER. Normally that is true, but you are correct, Senator, on occasion there will be a union that will elect party status in a case.

Senator METZENBAUM. Now, Mr. Rader, you were the attorney for the B.B. Andersen Construction Co., in its 1981 OSHA warrant case. I think that has already been agreed to, right?

Mr. RADER. Yes.

Senator METZENBAUM. And as I understand it in that matter, the company felt that it had been subjected to an unlawful search by OSHA compliance officers. Is that correct?

Mr. RADER. That is correct.

Senator METZENBAUM. And as Senator Simon has pointed out, you sent a letter to your friend, then Congressman George Hansen; is that correct?

Mr. RADER. As a result of his telephone call to me, asking me to send him the letter, that is correct.

Senator METZENBAUM. Now, just out of the blue, did he just call you and say, "Bob, would you send me a letter about the *Andersen* case?"

Mr. RADER. No. As I said earlier, Mr. Andersen wrote a number of letters to a number of Senators and Congressmen, including Congressman Hansen.

Senator METZENBAUM. Pardon?

Mr. RADER. Mr. Andersen wrote a number of letters to a number of Senators and Congressmen about the case, including Congressman Hansen.

Congressman Hansen called me and said, "What is the case about? Would you tell me the details of the case?"

I explained them to him over the phone, and he then asked me to write him a letter, which he could use as a basis for contacting Mr. Auchter.

Senator METZENBAUM. Well, if he had called you, why would you start your letter off: "Dear George, As the founder of the 'Stop OSHA' movement, there is a flagrant case of OSHA abuse in Kansas I think you should be aware of"? He obviously already knew about it.

Mr. RADER. That is right.

Senator METZENBAUM. I do not know why you would say that.

Then at the end, "My purpose in writing is to apprise you of this situation and to urge you to take this matter up with the Secretary of Labor and with Mr. Auchter, Assistant Secretary for Occupational Safety and Health. Hopefully, in light of the more reasonable attitude and new administration, they will give us a hearing

and will agree that this flagrant disregard of OSHA's own regulations must not be tolerated."

Now, that does not seem to tie in with your comment that he had contacted you about this case, because you are telling him all about the case—and I did not read the entire substance of the letter—but it does not tie in, Mr. Rader, as to his having contacted you.

Mr. RADER. Well, the fact is that he did contact me. I guess the explanation for the way the letter is phrased is perhaps, when we discussed it he said, "Write me a letter that I can take to Mr. Auchter," and that is the only explanation I have for the way it opened.

But I did not just send him the letter out of the blue.

Senator METZENBAUM. Well, let us see. In your letter, you wrote, "I think you should be aware OSHA conducted an inspection by force against the B.B. Andersen Construction Co." You wrote that, "Mr. Andersen felt that they had been harrassed enough and wanted to contest the warrant."

Now, you are writing to a man who has already been in touch with Mr. Andersen.

Mr. RADER. That is right.

Senator METZENBAUM. You complain in your letter about "the harsh choice forced on employers by OSHA's position that once a warrant is executed, the employer must exhaust administrative remedies and allow the OSHA Review Commission to determine the constitutionality of the court's warrant."

All these things, he already knew.

Mr. RADER. But you see, Senator, the purpose of the letter as I understood it from Congressman Hansen was to have something that he could give to Mr. Auchter which would explain in one letter what the legal issues were, what the facts were.

Senator METZENBAUM. When you wrote the letter, were you aware that the courts and OSHA Administrator Auchter had already found that there was no use of force by the OSHA inspectors?

Mr. RADER. Well, at the time I wrote the letter, I do not think I was aware of anything that Mr. Auchter or anybody associated with the Department of Labor had decided or done on the case. I do not remember exactly when the letter was written in conjunction with everything else.

If you will read the letter that Senator Hatch put in the record, and if you will read the subsequent policy directive that was issued by Mr. Auchter, and if you will read the brief to the Tenth Circuit Court of Appeals, it is pretty clear that they recognized that the inspection was by force. They did not want to just flat-out make that admission, but they recognized that it was by force, and it was contrary to their own regulations.

Senator METZENBAUM. Well, you say that they recognized it. But let me just read you from the court decision itself.

Notwithstanding the extreme gravity of the violations which were discovered in the inspection, the appearance of impropriety and the agency's long-term interest in promoting good working relations with employees caused OSHA to decide not to issue the citation.

But the fact is, they talk about "the extreme gravity of the violations." So I do not understand how you get to the point that they had recognized that it was not a matter of major moment.

Mr. RADER. Well, I think the quote you read establishes that they recognized the impropriety of the entry by force and the violation of their own regulations. If in fact those citations existed as a result of their inspection—which sort of puzzles me, because they had just inspected that jobsite and had not found any of those things—but if they existed, then they certainly should have issued the citations. And that, in fact, would have given us an opportunity to raise the constitutional matters before the OSHA Review Commission, which is what we wanted to do after the district court dismissed our case.

Senator METZENBAUM. Mr. Chairman, I want to put Mr. Rader's letter to Congressman Hansen in the record, please.

Senator QUAYLE. Without objection, it will be made a part of the record.

[The document referred to follows:]

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April 16, 1981

Congressman George Hansen
1125 Longworth House Office
Building
Washington, D.C. 20515

RE: B. B. Andersen Construction Company, Inc. v. OSHA

Dear George:

As the founder of the Stop OSHA movement, there is a flagrant case of OSHA abuse in Kansas I think you should be aware of.

On April 1-2, 1981, OSHA conducted an inspection by force against B. B. Andersen Construction Company, Inc., at a jobsite in Arkansas City, Kansas. This inspection was the fourth inspection of Andersen in the last three months, and the second at that jobsite. These inspections were triggered by anonymous telephone complaints and complaints from disgruntled ex-employees. Apparently OSHA made no effort to determine whether the complainants in each case were current employees, or were in a position to know whether the alleged hazards actually existed. The complaints that triggered the April 1-2 inspection were made by two ex-employees as part of an acknowledged effort to get "revenge" against Andersen for being laid off in February, 1981.

In this case OSHA did not request an inspection of Andersen's jobsite before seeking a warrant. Instead, OSHA obtained an ex parte warrant first, based on these complaints, and showed up at the jobsite on April 1 to inspect.

Andersen believed this fourth inspection request was completely unreasonable and that they had been harassed enough, and wanted to contest the warrant. As you know, the only way an employer may have a court hearing on the validity of an OSHA search warrant is to refuse to honor the warrant and then defend in a subsequent civil contempt action. This harsh choice has been forced on employers by OSHA's position that once a warrant is

executed, the employer must "exhaust administrative remedies" and allow the OSHA Review Commission to determine the constitutionality of the court's warrant.

In this instance, Andersen was so certain that these continuous inspections (which, all told, produced only one non-serious no-penalty citation) were unjustified that the company was willing to risk contempt in order to have its day in court on the validity of this warrant.

Therefore, when OSHA attempted to inspect on April 1, Andersen representatives told the Compliance Officers they would not... honor the warrant and requested the Compliance Officers to leave. But the OSHA Compliance Officers refused to leave and commenced a two-day inspection of Andersen's jobsite by force! In so doing, the OSHA Officers deliberately, flagrantly, intentionally violated OSHA's own regulations which expressly prohibit entry by force, even with a warrant.

George, this outrageous conduct simply cannot be tolerated. In the first place, if we are to have government by law, we must be able to rely on an agency's published rules and procedures. For this reason, the courts have repeatedly held that when an agency fails to observe its own regulations, its conduct violates the due process clause of the Fifth Amendment, and its action must be struck down. OSHA's refusal to comply with agency regulations here clearly violated Andersen's due process rights.

Secondly, if OSHA is allowed to conduct inspections by physical force, rather than seeking court enforcement of the warrant, employers will be deprived of their only method for obtaining a court hearing on the reasonableness of OSHA's inspection request and the constitutionality of the warrant.

If this Kansas precedent stands, OSHA can obtain a wall-to-wall warrant based on a questionable complaint, conduct an inspection by force, and thereby require the employer to defend against unconstitutionally obtained evidence before the OSHA Review Commission. In short, the warrant requirement will become a meaningless formality.

B. B. Andersen has filed suit in the United States District Court in Kansas to strike down OSHA's illegal conduct. Preliminary indications are that OSHA intends to contend that

Andersen must "exhaust administrative remedies" since the warrant has already been executed. At any rate, the company is facing long and expensive litigation. I am enclosing copies of our complaint and brief which set forth the pertinent facts and law more fully.

My purpose in writing is to apprise you of this situation and to urge you to take this matter up with the Secretary of Labor and with Mr. Auchter, Assistant Secretary for Occupational Safety and Health. Hopefully, in light of the more reasonable attitude of the new administration, they will give us a hearing, and will agree that this flagrant disregard of OSHA's own regulations must not be tolerated.

Sincerely,

Bob

Robert E. Rader, Jr.

RER,jr;las

Enclosures

Senator METZENBAUM. Let me tell you what OSHA said they found at the Andersen jobsite, in connection with this matter of extreme gravity.

Mr. RADER. Excuse me, Senator, I do not mean to be rude, but I have read that. So if the purpose is to inform me, I have read that.

Senator METZENBAUM. Well, I thought that you had, Mr. Rader, and that is what concerns me about your reaction after you had read it. But the rest of the country does not know about it, and there are 230 million Americans who might have an interest.

Mr. RADER. Well, in all due respect, Senator, why are you concerned about my viewpoint? Why are you not concerned that the Secretary of Labor did not issue the citations?

If, in fact, they found them, why didn't they issue the citations?

Senator METZENBAUM. Because I think the Court indicated why, and I think it was very clear—"the agency's long-term interest in promoting good working relationships with employees caused OSHA to decide not to issue the citations." And maybe there were some other reasons, and we will get to that, also, because isn't this the case where Mr. Auchter subsequently becomes the president of B.B. Andersen Co?

Mr. RADER. Well, it is my understanding he went to work for Andersen, yes.

Senator METZENBAUM. I think maybe we ought to get into all of it, don't you? Don't you think it is a rather rare, odd situation that the man who is leading the charge and then decides to adopt the charge, by coincidence winds up becoming president of the company? I cannot blame you for that.

Mr. RADER. Well, that is right, you cannot. And I do not know anything about it, either, so if you have any questions, why, that is my answer.

Senator METZENBAUM. Well, OSHA said they found at the Andersen jobsite: lack of required safety lines for employees working above the construction site, unstable scaffold reports, and inadequate guardrails on scaffolds. They found unguarded sawblades that exposed workers to possible amputation or lacerations from flying teeth, flying chips, or the rotating sawblades. They found protruding concrete reinforcing bars that could impale a fallen worker. They found backdated operators' cards for workers who actually lacked required training for certain equipment.

The total penalties that were recommended came to $12,680. Now, then, you write to Hansen and you say, "My purpose in writing is to apprise you of this situation and urge you to take this matter up with the Secretary of Labor and with Mr. Auchter, Assistant Secretary for OSHA. Hopefully, in light of the more reasonable attitude"—I have read that already—"they will agree this flagrant disregard of OSHA's own regulations must not be tolerated."

Now, you tell us as you come here that you are interested in occupational safety and are concerned about that. Here is a case where the instances of violations are serious enough to cause harm, to put workers in jeopardy. They have already done that, caused such harm, with respect to some employees. And you find that the whole issue revolves around a technical issue about the issuance of a warrant.

How do you reconcile that position with your desire to hold this position and your claim that you are concerned about worker safety and health?

Mr. RADER. Well, Senator, you have to understand first, at the time of the inspection when they contacted me, they said, "We have just been inspected on this jobsite. We have had this guy who was laid off"—this apparently was a school—"who has gone to the school board and said there had been structural deficiencies in the building; they have had the architect out there. This guy has been giving us a hard time, horsing us around, and has filed this complaint to get this warrant."

Now, at that point in time, I had no reason to believe that there were any violations on the jobsite, because a previous inspection had revealed in fact that it was a pretty darned clean jobsite.

After we went into the district court, the district court dismissed our action. We said, OK, we will wait then and raise our constitutional issues before the Review Commission. The Secretary said, "We are not going to issue any citations."

That really did not surprise us, because we did not expect that there would be very many, because we thought the jobsite was pretty clean. We did not find out about these supposed violations until the Secretary's responsive brief in the tenth circuit, which was 8 or 10 months later.

Senator METZENBAUM. Did you ask the Department of Labor, OSHA, what they had on the matter, as to whether or not there was any reason to be concerned?

Mr. RADER. I operated strictly through the local counsel, Randy Forbes, until we got into the tenth circuit. I had no contact with the Department of Labor.

Senator METZENBAUM. You did not think that was part of your responsibility as a lawyer who thought it was so terrible and so flagrant and bad that you wrote to Congressman Hansen about it and asked him to use some political pressure?

Mr. RADER. I am not sure I understand your question.

Senator METZENBAUM. Well, you said that you do not know anything about the details of what occurred, that that was in the hands of the local counsel. Yet you thought the matter of the handling of the case was so bad that you write to Congressman Hansen and talk about this "flagrant disregard of OSHA's own regulations." But you do not seem to be worried about the occupational safety and health problems of the worker.

Mr. RADER. Well, I thought your question was why did I not call the Department of Labor to see if they had found any violations on the jobsite.

Senator METZENBAUM. No.

Mr. RADER. That was not your question?

Senator METZENBAUM. No.

Mr. RADER. OK. I am still confused, then.

Senator METZENBAUM. My question is, you are making a cause celebre out of this case to the Associated General Contractors, Congressman Hansen, and you are really raising a lot of hell about the matter politically.

Now, at that point, you have no interest at all in the problems of what is happening to the workers; you do not raise any questions

about it. You do not ask your local counsel, "What is the problem?" You do not ask Mr. Andersen what are they really saying about you. You do not ask the Department of Labor. You do not ask anybody anything at that point; is that right?

Mr. RADER. No, that is not right. First of all, I was not raising political pressure. Mr. Andersen was sending out letters.

Second, normally, in the course of these cases, and I presume in this case, when I talked to the local counsel about the matter, I would ask him what was the result of the inspection. If somebody goes out there and finds a very bad workplace, my position and practice normally, advising you as a lawyer, as a practical matter, is to say that you really ought not to go into court on a legal technicality if you have got an unsafe workplace because it affects—if for no other reason, it affects your credibility.

The indications that I had from Mr. Forbes, the local lawyer, and from Mr. Tinkum, who was the vice president of B.B. Andersen, were that it was a safe workplace, that OSHA had not really found anything, that they had gone around trying to solicit complaints from workers on the job without success. And so, when OSHA advised us that no citations would be issued, we really were not surprised at that.

Senator METZENBAUM. Well, did they possibly come to that conclusion because of the political pressure? Here was Hansen writing:

> The Reagan Administration came into office on a wave of promises generally pledging to get the Government off the backs of the citizens. President Reagan was even more specific with regard to respecting the civil rights of the citizens of the country and directly condemned the excesses of OSHA, which you head.
>
> "I demand that you look into this matter with a view toward correcting the injustice to the Andersen Company without forcing it to long and expensive litigation."

Now, would you say that you were involved in getting Congressman Hansen to apply that kind of political pressure?

Mr. RADER. It is precisely as I stated a while ago, and that is, after Congressman Hansen called me, he said, "This is a serious matter. I want to approach Mr. Auchter about it. Will you write me a letter that I can use in approaching Mr. Auchter?"

Senator METZENBAUM. And what was Mr. Auchter's response to Hansen?

Mr. RADER. Well, my recollection is that his response to Mr. Hansen and to B.B. Andersen and to the various Senators who subsequently contacted him about the case, and Congressmen who contacted him about the case, was pretty much the same in every case, and I think it is set forth in this letter that Senator Hatch put in the record.

Senator METZENBAUM. But he said that the warrant was sought in accordance with established procedures. He said, "The Court had determined that OSHA had established probable cause to perform an inspection."

He said that, "OSHA's prohibition against use of force was not violated."

He did say he regretted the incident and said he would "reemphasize the agency's policy to employ judicial proceedings in these matters."

In effect, Mr. Auchter said nothing was done wrong, but that if they had to do it over again they would do it differently.

Now, then, the Andersen Co. never received the citations for the violations of extreme gravity that were discovered, did it?

Mr. RADER. No, I do not believe the citations were—I believe the first time anybody knew about the citations was when they were attached in the responsive brief in the tenth circuit several months later.

Senator METZENBAUM. So what we have here is a case where Mr. Andersen is writing letters; you either contact Hansen, or Hansen contacts you, depending upon whatever the facts are; Auchter himself participates in the decision to drop the citation, and then Auchter becomes president of B.B. Andersen. Is that right? Yes or no?

Mr. RADER. Well, I did not contact Congressman Hansen, so that part of your statement is not accurate——

Senator METZENBAUM. I said either you contacted them, or they contacted you.

Mr. RADER. If you are asking for my candid opinion on whether they actually found those violations, I would be reluctant to agree that those violations existed. My own judgment is that they may not have existed, and that they were created as a litigation strategy in the 10th circuit. So I do not want to say I agree that those existed.

Senator METZENBAUM. You are a lawyer. What is the evidentiary basis for that statement you just made, that the violations may not have existed and that they were created? Tell us as a lawyer how you would support that statement.

Mr. RADER. Well, first of all, in the correspondence that Mr. Auchter was sending to everybody in response to this incident, he was saying, "We are good guys." Why did he not at that time, if they had found serious violations, why didn't he point out then that they were withdrawing the citations to show what good guys they were?

Second, I have had other cases that involved entry by force, and that never stopped the Secretary from issuing the citations when they found them.

Third, by not issuing citations, they were able to prevent Andersen from having an administrative remedy to exhaust, and then when they did subsequently say, "We found violations, but we decided to withdraw them," they cut the ground out from under us in the tenth circuit; they made the case moot.

You see, had we known that they had found the violations and then withdrawn them, I would have told Mr. Andersen that the tenth circuit appeal was a pretty chancy proposition.

Senator METZENBAUM. Well, as a matter of fact, even the 10th circuit court of appeals said, "The apology and refusal to issue citations were wrung out of the Secretary by Congressman Hansen."

Mr. RADER. Well, that is——

Senator METZENBAUM. That is what?

Mr. RADER. I was going to say that is precisely my point, I think, and that is, by saying that they had found them and that they were going to withdraw them, they were able to argue, then, that the case in the tenth circuit was moot.

Senator METZENBAUM. Well, what happened was, what the court was saying is that political pressure was brought, and they wrung out of the Secretary his refusal to issue the citations.

Mr. RADER. That is what the 10th circuit said.

Senator METZENBAUM. Now, do you recall any correspondence between B.B. Andersen and the U.S attorney in Kansas?

Mr. RADER. Yes.

Senator METZENBAUM. What was that about?

Mr. RADER. Well, Andersen's view was that the complaint had been filed by this disgruntled ex-employee to try to get back at him. The act itself provides that an employee who makes a false complaint is subject to sanctions under the act.

I advised Mr. Andersen if he truly believed that, then his remedy was to contact the U.S. attorney and say that there is a man here who has made false accusations under the act. I believe he did so, and I believe he sent me copies of that correspondence.

Again, Senator, I would say that had we known that they had found violations on the jobsite, that is not a step that we would have taken because obviously, the man could not be accused of making a false complaint.

Senator METZENBAUM. There was more than one employee, wasn't there?

Mr. RADER. I believe there were two, yes. Both had been laid off.

Senator METZENBAUM. And after consultation with you as attorney, Mr. Andersen wrote the U.S. attorney in Kansas and asked him to consider criminal charges against the workers who complained, the OSHA inspectors, their superiors, and other OSHA personnel.

Do you think that is sort of a form of intimidation that you were being a party to?

Mr. RADER. No.

Senator METZENBAUM. After the U.S. attorney refused to take those actions, do you recall writing to Mr. Andersen?

Mr. RADER. Well, do you mean with respect to that?

Senator METZENBAUM. Yes.

Mr. RADER. I may have.

Senator METZENBAUM. Didn't you write to him and say, "I suggest you write Mr. Streepy"—he was the U.S. attorney—"back and advise him that his response is unacceptable, and that you want him to enforce the clear terms of the law. Streepy still probably will not do anything, but you will have made a better record for future cases."

Did you write that?

Mr. RADER. Well, Senator, you have the advantage of me. If you have a copy of the letter, then obviously, I did.

Senator METZENBAUM. Well, Mr. Chairman, I ask unanimous consent to put that letter as well as Mr. Andersens letter to the U.S. attorney in the record at this point.

Senator QUAYLE. Without objection.

[Information supplied for the record follows:]

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July 30, 1981

Mr. B.B. Andersen
P. O. Box 1692
Topeka, Kansas 67156

Dear Mr. Andersen:

I have received a copy of U.S. Attorney Streepy's letter declining to prosecute the ex-employees making false complaints on the Arkansas City job.

I suggest you write Mr. Streepy back and advise him that his response is unacceptable and you want him to enforce the clear terms of the law that prohibits making false complaints. There is no doubt that the complaints were false - as evidenced by the lack of any OSHA citations - and you are prepared to offer sworn testimony that the false complaints were made intentionally and in bad faith.

Streepy still probably will not do anything but you will have made a better record for future cases.

Sincerely,

Bob Rader

Robert E. Rader, Jr.

RER:jr:lam

B.B. ANDERSEN COMPANIES, INC.
GENERAL CONTRACTORS DEVELOPERS

August 17, 1981

Mr. Robert S. Streepy
Assistant U.S. Attorney
Columbian Title Building
820 Quincy
Topeka, KS 66612

Dear Mr. Streepy:

We are in receipt of your response to our earlier request. Your response is unacceptable and totally disappointing.

We would like you to enforce the clear terms of the law that prohibits making false complaints. Our records clearly show that one of the written complaints which OSHA used to gain a search warrant was marked as indicating the complainant was a present employee. Our records also clearly show that the same complainant was released the day before.

It is certainly disappointing that your office and OSHA feel no action should take place in light of all the circumstances. There is no doubt that the complaints were false, as evidenced by the lack of OSHA citations. We are more than prepared to offer sworn testimony that the false complaints were made intentionally and in bad faith.

Sincerely,

B. B. ANDERSEN CONSTRUCTION CO., INC.

B. B. Andersen
President

BBA/pas

bcc: Robert Rader
Randy Forbes

Mr. RADER. I would add, Senator, that again this establishes that we had no knowledge that they had found any violations or were going to issue any citations, because we certainly would not take that step, had we known that the complaints were in fact not false.

Senator METZENBAUM. But what bothers me, Mr. Rader, and that you do not seem to be sensitive to, is the fact that the complaint was filed. You do not check to find out whether there is any basis for the complaint. But no, Mr. Rader is determined as counsel to see to it that his client crowds the U.S. attorney—goes back to him twice—to come in with possibly a criminal indictment against some employee or employees who have filed a complaint. You do not seem to be offended by that. You do not seem to think that that—that does not bother you at all, that this employee actually was right, and you now admit it. But you did not check to see if he was right or not. You just go ahead, and you say, "Let us go after that employee. Let us get him."

Mr. RADER. Senator, there is a provision in the law that says when OSHA comes out to inspect based on an employee complaint, they have to give a copy of that complaint to the employer so the employer has some means of verifying that there was in fact a complaint. Now, that is the law, in the act itself.

Senator METZENBAUM. OK.

Mr. RADER. If in fact there had been a complaint, then wouldn't you suppose that when the OSHA inspectors came out to inspect, that they would have given them a copy of the complaint?

Senator METZENBAUM. What does that have to do with it? Is that the problem of the employee, if the OSHA inspector did or did not give them a copy?

What bothers me is your desire to get the employee who had the audacity to file a complaint which happened to be right.

Mr. RADER. Well, I do not know that the employee's complaint was right.

Senator METZENBAUM. But you do know about all these violations that I just read to you a minute ago.

Mr. RADER. Well——

Senator METZENBAUM. Are you disavowing the accuracy of the representations that I have made to you? Is that what you are doing?

Mr. RADER. I think what I said earlier was that I would not concede that those violations existed without further information. It does not fit the rest of the facts in the case.

Senator METZENBAUM. Would you concede that somebody lost some fingers on the job and part of a hand—oh, pardon me. A different company. I am sorry. I withdraw the question.

Mr. RADER. The point that I am trying to make, Senator, is that all the evidence that was before us at the time indicated that the violations did not exist, that the employee had made a false complaint, that he had done so to seek retribution and to use the agency to penalize the employer because the emloyer had laid him off. And this is precisely the type of conduct that the act prohibits, that the legislative history of the act says is wrong. And so when Mr. Andersen says, "Surely, we can do something about these guys who are just filing these false complaints against us," I advised him what the provisions of the act were.

Senator METZENBAUM. And then, after the U.S. attorney responds, you go back and tell them how to crowd the U.S. attorney and really push him—and not only to go after the employees, but to go after the OSHA inspectors, their superiors, and other OSHA personnel; right?

Mr. RADER. Well, I think I will say that the letter speaks for itself. I was——

Senator METZENBAUM. Well, is it right or wrong? Is it wrong?

Mr. RADER. I certainly did not believe that anybody was going to be put in jail. I think the response that the U.S. attorney made was just sort of a pro forma dismissal of the case, which I thought was not fair.

Senator METZENBAUM. You say that nobody was going to be put in jail, and yet you go back and tell Streepy that his response is unacceptable, that you want him to enforce the clear terms of the law. "Streepy still probably will not do anything, but you will have made a better record for future cases."

Do you think that workers or anybody ought to be prosecuted for reporting safety violations?

Mr. RADER. No.

Senator METZENBAUM. And yet you want to do that in this case.

Mr. RADER. The information that we had, Senator, as I say, was that there were not safety violations, and that the sole motivation of the worker was to seek retribution against the company because they had been laid off. And there was a substantial amount of evidence that supported that.

Senator METZENBAUM. Mr. Rader, despite the fact that the citations were dropped, did you continue to pursue the matter in the courts?

Mr. RADER. Well, we found out that the citations were dropped with the filing of the Secretary of Labor's brief in the tenth circuit. At that point, the only thing that remained was the filing of a reply brief and oral argument. I mean, the case was virtually completed.

Now, if you are asking me did the case continue to its completion, yes.

Senator METZENBAUM. Well, did you insist on pursuing the matter even after the Federal district court found that the case was moot because no citations were issued?

Mr. RADER. We appealed the case to the tenth circuit at Mr. Andersen's strong request.

Senator METZENBAUM. Well, how do you explain the fact that a responsible newspaper reporter by the name of Mike McGraw says that, "Mr. Andersen later said of Rader, 'I told him it was a 'no deal' for me. Rader was trying to make new law with it, and I just did not think it would make us any money in the end.' Rader personally assumed the cost of a lawsuit that resulted from a 1981 inspection after his client decided he wanted to stop pressing the case."

Did that newspaper reporter lie?

Mr. RADER. Yes.

Senator METZENBAUM. Now, the Kansas City Star, with Mike McGraw reports the following——

Mr. RADER. The same guy.

Senator METZENBAUM [conferring with staff]. Oh, it is the same guy. I am sorry. OK, I thought it was a different guy.

Mr. Chairman, I believe that I am going to want that newspaper reporter brought in, because either he lied in his story, or Mr. Rader lied. If Mr. Rader lied, he is under oath, and he would also be guilty of champerty.

Senator QUAYLE. Well, I will have to take this up with the chairman of the committee.

Senator METZENBAUM. Of course. I understand. I understand that.

Senator QUAYLE. He is not here right now, and in fact, I am just filling in for him. He called me and asked me if I could come over and pinch-hit while he went over on the floor, and I said, "Sure, I will be glad to come over." Now I wish I had reconsidered, after having to listen to this for the last 40 minutes. [Laughter.]

But go ahead, Senator Metzenbaum, proceed.

Senator METZENBAUM. It is a pleasure to have you with us. But you may leave if you want; it will not make any difference to me.

Senator QUAYLE. I might.

Senator METZENBAUM. It will not make any difference to me.

Mr. Rader——

Mr. RADER. Senator, if I may interrupt——

Senator METZENBAUM. Surely.

Mr. RADER. I have in my files billing records and time sheets, as all lawyers do, that substantiate what I say, and I am glad to furnish those to you if you would like to see them.

Senator METZENBAUM. I would be interested in them. Are you saying that you paid none of the costs——

Mr. RADER. That is right.

Senator METZENBAUM [continuing]. Or are you saying you provided none of your legal time free?

Mr. RADER. That is correct.

Senator METZENBAUM. And that you were paid for all the work you did in connection with the *Andersen* case?

Mr. RADER. That is correct.

Sentor METZENBAUM. And you had previously attempted to get the Associated General Contractors to pay for part of the appeal; is that correct—or pay for the appeal?

Mr. RADER. Well, I had responded to their telephone call. I think I outlined the scenario previously. And they said they would like to go to their committee or executive committee or whatever it was and get some money for the case, and would I write them a letter to help them do that.

Senator METZENBAUM. You have called this case "a rare opportunity to establish important constitutional precedent that will significantly restrict OSHA in the future." Is that your language?

Mr. RADER. That is my language. Again, as I explained to Sena-
r Simon, the context of that was that general contractors were
terested in restricting inspections based on a complaint to the
mplained item.

Senator METZENBAUM. Mr. Chairman, I am not certain whether
e letter to Associated General Contractors is or is not yet in the
cord, but if it is not, I will offer it at this time.

Senator QUAYLE. We will ascertain whether it is, and if it is not,
e can certainly make it a part of the record at your request.

[The document referred to follows:]

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February 8, 1982

Mr. Tom Slattery
Mr. Dan Morgan
Associated General Contractors
of Kansas, Inc.
200 West 33rd Street
Topeka, Kansas 66611

RE: B.B. Andersen Construction Co., Inc. v.
Raymond J. Donovan, Secretary of Labor, Et Al
No. 81-1742; Tenth Circuit Court of Appeals

Dear Tom and Dan:

As a follow-up to our telephone conversation I am enclosing a copy of our brief to the Tenth Circuit in the above case so you can review the issues involved.

Because of its unique facts and procedural posture, I believe the case presents a rare opportunity to establish important constitutional precedent that will significantly restrict OSHA in the future -- which will benefit not only Andersen, but all other employers as well.

If we are successful in this case, we could get a judicial declaration that

(a) OSHA cannot obtain a warrant based on an anonymous complaint from a disgruntled ex-employee;

(b) OSHA cannot, in any event, inspect by force, but must give an employer a court hearing prior to any warrant enforcement; and that

(c) Employers need not spend thousands of dollars litigating the constitutionality of an OSHA search before the OSHA Review Commission as a prerequisite to a determination by a real court; rather, they are entitled to a court

hearing on the constitutionality of the search first -- before any lengthy OSHRC contest proceedings.

I frankly believe this case is one of the most important pending in the courts today. I also believe the Solicitor has offered to "settle" largely because he is afraid he will lose.

I am personally reluctant to settle the case. I know that Mr. Andersen does not wish to embarrass Thorne Auchter. However, I am more inclined to think that if anyone will be embarrassed it will be the Solicitor. First, although OSHA abuses are frequent, rarely are they portrayed so vividly as in this case, as you can see if you read the enclosed brief.

Second, Thorne Auchter will not always be Assistant Secretary of Labor for OSHA -- we may have another Eula Bingham some day. The time to make precedent is when we have a good case.

Third, the potential precedent in this case will affect and protect all employers (particularly contractors).

Finally, the majority of the work and expense is behind us. We have filed our main briefs to the Tenth Circuit, so the only thing left is to perhaps file a short reply brief, and present oral argument. I would be very surprised if the additional costs exceeded $2,000.

I personally hope that you encourage Mr. Andersen to proceed with the case. I also think the AGC should seriously consider supporting the case financially, since the outcome will profoundly affect all AGC members.

I will be glad to furnish any additional information or discuss the case with you further if you wish.

Sincerely,

Robert E. Rader, Jr.

RER,jr:lar
Enclosure

Senator METZENBAUM. In your letter to the AGC, you state, "Employers need not spend thousands of dollars litigating the constitutionality of an OSHA search before the OSHA Review Commission as a prerequisite to a determination by a real court."

Since you appear to be questioning the importance and the necessity of the Review Commission, why do you now want to be on that same Review Commission?

Mr. RADER. Well, the Commission is not an article III court. I think the point of what I was saying there goes back to what I said earlier, and that is, my view, my personal view, is that when an employer contests the validity of a warrant, he should be able to allow the inspection and then file a motion to suppress in the court that issued the warrant as in a criminal case, and adjudicate the validity of the warrant and the inspection at that time.

Under the law as it evolved, which I opposed, but nevertheless it is now the law, the law as it evolved says that once the warrant is executed, the employer has to litigate all these matters before the OSHA Review Commission.

But my view at that point was that this constitutional question should be made by an article III court, and that was the thrust of my letter.

Subsequently, the courts have said that the Review Commission should rule on these matters. I do not think that is what the law should be, but that is what the law is, and in fact, I have—well, that case is not published, so I cannot address that.

Senator METZENBAUM. You do not think the Review Commission should have the right to pass on these cases. You think that the litigant ought to go right into court?

Mr. RADER. I do not think as a constitutional matter that it is proper for an administrative adjudicatory agency to grade the papers of the Federal courts.

Now, the courts have differed with me——

Senator METZENBAUM. To "grade the papers of the Federal courts"?

Mr. RADER. That is what it amounts to when the Review Commission determines whether or not a warrant is constitutional.

Senator METZENBAUM. Well, if we followed your line of reasoning, wouldn't we totally abrogate most of the agencies that have the obligation to administer laws, whether it is the FTC or the FCC or perhaps the FDIC, because in each of those there are responsibilities that are being done by agencies of government that you could say that the right of the individual is to have that matter litigated before a court?

Mr. RADER. Well, I am not sure I——

Senator METZENBAUM. It is in varying degree, I mean, different kinds of cases, not all with one.

Mr. RADER. I am not sure I follow you. The Constitution says specifically that a warrant must be issued by an article III court, and the probable cause determination for that warrant under the fourth amendment must be made by an article III court. Now, when the Review Commission makes the determination that that court was wrong in issuing the warrant, in my judgment that violates the separation of powers doctrine.

As I say, however, that is my personal view; that is not what the law is, and I subsequently have followed the law.

Senator METZENBAUM. Well, in that case, wouldn't you have some reluctance to be authorizing the issuance of warrants when you do not believe that the agency that you are working for has the right to issue those warrants?

Mr. RADER. Well, the agency does not issue warrants. The warrants still come from the courts, but then the parties come before the Review Commission and they say to the agency, "The court goofed when it issued this warrant." That is what I meant when I said——

Senator METZENBAUM. The court what?

Mr. RADER. The court goofed when it issued this warrant, and that is what I meant when I said the agency then is in a position of grading the papers of the Federal court.

Senator METZENBAUM. I see.

Now, did you think Thorne Auchter was doing his—is it "his" or "her"—doing his job well? [Pause.]

Mr. RADER. I think he initiated some things that were improvements at the agency.

Senator METZENBAUM. So, yes, or no, do you think he was doing his job well?

Mr. RADER. Well, on the other hand, he did some things that I disagreed with.

Senator METZENBAUM. Why did you write in your letter to the AGC, "Thorne Auchter will not always be Assistant Secretary of Labor for OSHA; we may have another Eula Bingham someday." What did you mean by that?

Mr. RADER. Well, I think it was generally felt by most people that Mr. Auchter was more responsive to the complaints that businessmen had than Eula Bingham had been.

Senator METZENBAUM. To the complaints that businessmen had more than Eula Bingham had been?

Mr. RADER. Yes. I think that was the general impression.

Senator METZENBAUM. And you thought that that was the way it ought to be; and you still think so?

Mr. RADER. The way what ought to——

Senator METZENBAUM. That OSHA should be more responsive to the concerns of the business community.

Mr. RADER. I think OSHA should be fair.

Senator METZENBAUM. Well, but that is not what you just said. You said that he was more responsive to the concerns of the business community, employers, than Eula Bingham, and therefore you thought that that was better. And then you went on to indicate that we might have another Eula Bingham today. Wasn't that the thrust of what you were saying?

Mr. RADER. I think the answer to that question, Senator, is that I think that the act should be administered fairly and impartially. That has not always been the case.

Senator METZENBAUM. Do you think a lawyer ought to be pushing his client to take an appeal if the client does not want to?

Mr. RADER. No.

Senator METZENBAUM. Then why did you write to the AGC, "The majority of work and expense is behind us. I would be very sur-

prised if additional costs exceeded $2,000. I personally hope that you encourage Mr. Andersen to proceed with the case. I also think the AGC should seriously consider supporting the case financially."

Wasn't that saying again why don't you put some pressure on Mr. Andersen? It says that in so many words, "I personally hope that you encourage Mr. Andersen to proceed with the case."

Do you think that is what a lawyer has the right to do?

Mr. RADER. Well, Senator, as someone who has practiced law, I am sure you have been in a situation where you will reach a point in a case where the client starts out gung-ho in the case and later in the case he says, "Lawyer, I have spent a lot of money on this case. How much more money is it going to cost me?" And you will explain to him, "Well, we have spent this much. We have this much left."

And he will say to you, "Well, I am getting to be a little bit concerned about the cost. What is your judgment on the case?"

And you will say to him at that time, "Well, I think it is a good case. The majority of the costs are behind us."

You know, if you are asking me for——

Senator METZENBAUM. But he is willing to drop it. You are saying to the AGC, "I think we should appeal this case, and I want you to first of all pay for it, and secondly, if you do not pay," in addition to that, encouraging Mr. Andersen to appeal it.

Mr. RADER. Mr. Andersen never, ever indicated to me that he wanted to drop the case.

Senator METZENBAUM. Well, how do you account for the fact in that same article that Andersen is quoted as saying, "I told him it was a 'no deal' for me. Rader was trying to use this case to make new law with, and I just didn't think it would make us any money in the end."

And then you go on and say to the AGC, that it gives us a chance, "a rare opportunity to establish important constitutional precedents that will significantly restrict OSHA in the future."

Andersen said he did not want to go on with the case, according to this article. Was the newspaper man lying also when he wrote that?

Mr. RADER. Yes. Mr. Andersen—I think I said earlier, the situation was that the Solicitor called me when the case was in the 10th circuit and said, "We would like to settle this case."

I conveyed the settlement offer to Mr. Andersen, as any lawyer would do, and he said, "Well, this case is going on. I am starting to get a little concerned about the cost. How much more is it going to cost me?"

I said, "Well, you are going to have a reply brief and oral argument in the tenth circuit."

Jim Tinkum was on the phone. He said to Jim Tinkum, "Well, the AGC has been hot for this case. See if they will contribute to the expenses."

The phone conversation ended. Subsequently, I talked with AGC. I wrote the AGC a letter. Subsequently, Jim Tinkum called me back and said, "Mr. Andersen says go ahead with the case."

Now, Mr. Andersen's concern was cost. He never said, "Do not go forward with the case."

Senator METZENBAUM. Do you think this direct quote that I read you is just a figment of the imagination of the newspaper reporter?

Mr. RADER. I think the quote is inaccurate. I think that Mr. Andersen was concerned about cost. I think the reporter took that and construed it as meaning that he did not want to go forward with the case.

Senator METZENBAUM. Do you think the newspaper reporter made up the words, "I told him it was a 'no deal' for me"?

Mr. RADER. What did he mean by "no deal"? I do not know what—I am not going to——

Senator METZENBAUM. I think it meant what obviously it means, and that is, "There is not any reason for me to go forward with this case. It is a 'no deal' for me."

Mr. RADER. I am not going to speculate what that reporter did, at least not out loud. The fact remains that I have time records and billing records that indicate that Jim Tinkum called me after that and said, "Go forward with the case." We discussed the case on several occasions. I sent him subsequent bills. The bills were paid.

Senator METZENBAUM. You are saying that B.B. Andersen paid for the appeal?

Mr. RADER. That is right.

Senator METZENBAUM. I would like to see those bills specifically referring to the appeal.

Mr. RADER. That is right.

Senator METZENBAUM. Will you make those available to us?

Mr. RADER. Surely.

[Information supplied for the record follows:]

McCARTY, WILSON, RADER & MASH, P.C.
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ENNIS, TEXAS 75119

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TOBY L. MASH
JOHN RICHARD WILSON
ROBERT E. RADER, JR.

OF COUNSEL:
BILLY J. MOORE

TELEPHONES
ENNIS 875-3851
DALLAS LINE 227-6090

November 20, 1981

Mr. Jim Tinkum
B. B. Andersen Construction Co.
P. O. Box 1692
Topeka, Kansas 67156

FOR PROFESSIONAL SERVICES RENDERED

RE: B. B. Andersen Construction Company v. Donovan, et al
No. 81-1742; Tenth Circuit Court of Appeals, and
Miscellaneous Pending Matters

For Period 5/13/81 Through 11/20/81

5/13/81 Review correspondence and portion of transcript from Randy Forbes; long distance telephone conference with Randy Forbes regarding transcript and potential motion for rehearing;

5/20/81 Review transcript of April 17 hearing before U.S. District Court;

5/27/81 Research procedures for obtaining new trial in federal district court; review transcript of argument in preliminary injunction hearing; preparation and drafting of motion for new trial; long distance telephone conference with Randy Forbes regarding this matter, also regarding cases and procedures for defending against citation on hospital job for exposure to asbestos;

6/1/81 Long distance telephone conference with Randy Forbes regarding necessary changes in our motion for new trial due to intervening order of judgment by U.S. District Court;

6/6/81 Review correspondence from Randy Forbes; review judgment entered by Judge Kelley;

6/11/81 Long distance telephone conference with Randy Forbes regarding Judge Kelley's denial of our motion for new trial and his conversation with Solicitor that no citation would be issued; also reported information on Assistant Secretary of Labor's response to our letter to Congressman George Hansen; long distance telephone conference with Randy Forbes;

6/12/81 Review correspondence from Mr. Andersen; long distance telephone conference with Randy Forbes

DUE AND PAYABLE UPON RECEIPT

regarding Solicitor's indication there will be no citation; conference call to be arranged;

6/17/81 Long distance telephone conference call with Randy Forbes and Jim Tinkum regarding appeal options, exhaustion of remedies, discussion of legal issues, history of exhaustion cases, potential costs on appeal;

6/22/81 Telephone conference with Randy Forbes regarding Andersen's decision to proceed with appeal to Tenth Circuit Court of Appeals;

6/29/81 Review correspondence from Randy Forbes and notice of appeal;

7/2/81 Long distance telephone conference with Jim Tinkum regarding Mr. Andersen's request for criminal sanctions against complaining ex-employees and against OSHA compliance officers; also regarding possible testimony before Senate sub-committee; also regarding appeal in federal court case;

7/6/81 Correspondence to Randy Forbes regarding notice of appeal to Tenth Circuit Court of Appeals;

7/8/81 Review correspondence from Clerk of Tenth Circuit Court of Appeals; prepare entry of appearance; correspondence to Clerk; correspondence to Randy Forbes;

7/10/81 Long distance telephone conference with Chuck Hadden regarding OSHA's decision to not issue any citations against Andersen and regarding appeal in Tenth Circuit;

7/13/81 Telephone conference with James Culp with Solicitor's office in Washington regarding fact that no citations will be issued; telephone conference with Randy Forbes regarding Culp's call and regarding status of appeal;

7/17/81 Review correspondence from Jim Tinkum and B. B. Andersen;

7/20/81 Review notice of appearance from Solicitor in Washington; review docketing statment to Tenth Circuit;

7/23/81 Long distance telephone conference with Randy Forbes regarding Tenth Circuit appeal and filing of

	transcript and cases on posting of warning of asbestos;
7/30/81	Review copy of correspondence from U.S. Attorney declining to prosecute false complaints on Arkansas City jobsite; correspondence to Andersen;
8/6/81	Telephone conference with Jim Tinkum regarding Texas competitive bidding laws in connection with Fort Worth police station job; research Texas statutes; long distance telephone conference with Jim Tinkum to advise as to law on situation where lowest bid comes in over budget amount;
8/7/81	Correspondence to Jim Tinkum;
8/9/81	Review order from Tenth Circuit Court of Appeals regarding dismissing appeal for lack of prosecution;
8/10/81	Long distance telephone conference with Randy Forbes regarding letter of dismissal from Tenth Circuit;
8/14/81	Review correspondence and order from Tenth Circuit reinstating appeal; long distance telephone conference with Jim Tinkum;
8/30/81	Review correspondence from Randy Forbes;
9/11/81	Long distance telephone conference with Jim Tinkum regarding OSHA oversight hearings;
9/14/81	Telephone conference with Mr. Andersen regarding problems in bidding Fort Worth job, and county attorney's opinion that bid cannot be negotiated; long distance telephone conference with Fort Worth City Attorney Paul Ishom;
9/23/81	Long distance telephone conference with Randy Forbes regarding brief to Tenth Circuit;
9/25/81	Long distance telephone conference with Randy Forbes regarding due date of brief to Tenth Circuit;
10/6/81	Review Tenth Circuit Rules of Procedure; preparation of motion for extension of time to file brief; correspondence to Clerk of Tenth Circuit;
10/7/81	Review correspondence and copies of rules from Randy Forbes; long distance telephone conference with Solicitor Chuck Hadden regarding agreement for extension to file brief;
10/19/81	Correspondence to J. Scott Brown, attorney with Great Plains Legal Foundation, regarding possible amicus curiae brief to Tenth Circuit;

10/22/81 Long distance telephone conference with Randy Forbes regarding Andersen employee who filed NLRB case and effect of settlement of that charge with our OSHA matters;
11/10/81 Review file and pleadings; research and preparation and drafting of brief to Tenth Circuit; correspondence to Clerk of Tenth Circuit;
11/11/81 Research, preparation and drafting of brief to Tenth Circuit;
11/12/81 Revise and complete brief to Tenth Circuit; correspondence to Clerk of Tenth Circuit;
11/18/81 Correspondence to Jim Tinkum.

Attorney's Fees	$2,253.00
Advances & Expenses	
Long distance telephone expense (May through November)	94.26
Photocopy expense (May through November - 885 copies at 8¢ per copy)...	70.80
TOTAL Attorney's Fees, Advances & Expenses	$2,418.06

THANK YOU!

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OF COUNSEL:
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ENNIS (214) 875-3851
DALLAS METRO 227-6090

March 22, 1982

Mr. Jim Tinkum
B.B. Andersen Construction Co., Inc.
P. O. Box 1692
Topeka, Kansas 66601

RE: B.B. Andersen Construction Co., Inc. v.
Raymond J. Donovan, Et Al
No. 81-1742; Tenth Circuit Court of Appeals

Dear Jim:

Enclosed is a copy of our Reply Brief to the Tenth Circuit.

I believe you have a copy of the Secretary's brief, but if not, call or drop me a note and I will send you a copy.

The Clerk of the Tenth Circuit advises that oral argument will probably be set sometime in autumn. I will keep you posted.

Since there should not be any activity in the case for several months, I am submitting our statement for services over the past three months.

Sincerely,

Robert E. Rader, Jr.

RER,jr:lar

Enclosures

McCARTY, WILSON, RADER & MASH, P.C.
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ENNIS (214) 875-5851
DALLAS METRO 227-8090

March 22, 1982

Mr. Jim Tinkum
B.B. Andersen Construction Co., Inc.
P. O. Box 1692
Topeka, Kansas 66601

FOR PROFESSIONAL SERVICES RENDERED

RE: B.B. Andersen Construction Co., Inc. v.
Raymond J. Donovan, Et Al
No. 81-1742; Tenth Circuit Court of Appeals

For Period 1/4/82 Through 3/22/82

1/4/82 Review Secretary's motion for extension of time to file brief to Tenth Circuit Court of Appeals; correspondence to Bradford Baker regarding Bell Enterprises case; review letter from Jim Tinkum regarding OSHA complaint letter;

1/5/82 Long distance telephone conference with Jim Tinkum to advise on how to answer to OSHA complaint;

2/3/82 Long distance telephone conference with Randy Forbes regarding OSHA's settlement offer; long distance telephone conference with Solicitor Charles Hadden in Washington; long distance conference call with Randy Forbes, B.B. Andersen and Jim Tinkum to go over settlement options and procedures; review file; long distance telephone conference with Randy Forbes; long distance telephone conference with Charles Hadden;

2/8/82 Review brief of Secretary of Labor to Tenth Circuit; correspondence to Tom Slattery and Dan Morgan at Associated General Contractors of Kansas;

2/11/82 Review correspondence from Randy Forbes; correspondence to Randy Forbes regarding filing of reply brief;

2/12/82 Telephone conference with Jim Tinkum regarding the Secretary of Labor's brief;

2/16/82 Long distance telephone conference with Clerk of Tenth Circuit Court of Appeals in Denver regarding extension of time to file reply brief and probable argument date; long distance telephone conference with Solicitor Charles Hadden in Washington regarding

DUE AND PAYABLE UPON RECEIPT

extension of time; preparation of motion for extension of time with correspondence to Clerk of Tenth Circuit;

3/17/82 Review file and briefs and begin research and preparation of reply brief;

3/18/82 Research, preparation and drafting of reply brief to Tenth Circuit;

3/19/82 Complete research and drafting of reply brief to Tenth Circuit Court of Appeals; correspondence to Clerk of Tenth Circuit; correspondence to Jim Tinkum; correspondence to Randy Forbes.

Attorney's Fees	$940.00
Advances & Expenses	
Long distance telephone expense	26.00
TOTAL Attorney's Fees, Advances & Expenses	$966.00

THANK YOU!

McCARTY, WILSON, RADER & MASH, P.C.
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DALLAS METRO 227-6080

March 14, 1983

Mr. Jim Tinkum
B.B. Anderson Construction Co.
P. O. Box 1692
Topeka, Kansas 67156

FOR PROFESSIONAL SERVICES RENDERED

FOR PERIOD 10/7/82 THROUGH 3/14/83

10/7/82	Long distance telephone conference with Randy Forbes regarding status of appeal to Tenth Circuit;(nc)
10/11/82	Review and respond to letter from auditors regarding status of case against OSHA; (30m)
1/13/83	Review correspondence from Clerk of Tenth Circuit Court of Appeals regarding scheduling of oral argument; correspondence to Jim Tinkum; (15m)
2/13/83	Review notice of oral argument and instructions from Clerk of Tenth Circuit Court of Appeals; correspondence to Jim Tinkum; correspondence to Randy Forbes; completion of entry of appearance form; (30m)
2/15/83	Telephone conference with Randy Forbes regarding oral argument; (nc)
2/18/83	Telephone conference with Jim Tinkum regarding oral argument; (nc)
3/3/83	Long distance telephone conference with Jim Tinkum regarding oral argument; (nc)
3/10/83	Review file and briefs; legal research and preparation for argument before Tenth Circuit Court of Appeals;(6hrs)
3/11/83	Presentation of oral argument to Tenth Circuit Court of Appeals. (4hrs)

Attorney's Fees - 11 hours at $85	$ 935.00
Advances & Expenses	
Long distance telephone expense	19.20
- Cab and limosine fare	27.00
- Hotel and meals	87.55
- Airport parking	10.00
TOTAL Attorney's Fees, Advances & Expenses	$1,078.75

THANK YOU!

DUE AND PAYABLE UPON RECEIPT

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October 21, 1985

Mr. Robert E. Rader, Jr.
C/O Occupational Safety & Health
Review Commission
1825 K Street North West
Washington, D.C. 20006

Dear Bob:

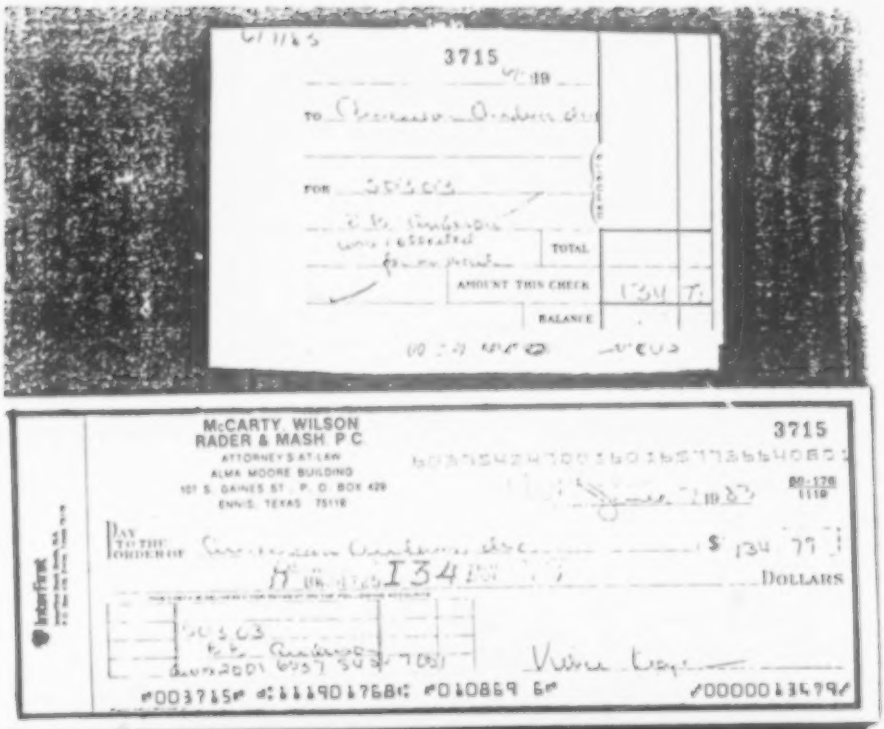
This will confirm my telephone call that our statement dated March 14, 1983 to B. B. Anderson Construction Company was paid on April 28, 1983.

Sincerely,

Vickie Krajca

Vickie Krajca,
Bookkeeper

vwk



3715

DATE 6/11/03

TO Secretary of State

FOR Service of Process

	TOTAL	
	AMOUNT THIS CHECK	134.77
	BALANCE	

McCARTY, WILSON
RADER & MASH, P.C.
ATTORNEYS AT LAW
ALMA MOORE BUILDING
101 S. DAINES ST., P. O. BOX 429
ENNIS, TEXAS 75119

3715

80-178
1119

PAY TO THE ORDER OF Secretary of State $ 134.77

One Hundred Thirty Four and 77/100 DOLLARS

Interfirst

For Service of Process
Cause No. 2001 6097 SA

Velma Lopez

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Senator METZENBAUM. The Anderson case took place in 1981?

Mr. RADER. I think that is when the district court action initiated. I believe the oral argument in the tenth circuit took place in 1983.

Senator METZENBAUM. OK. But you do have the bills on that, and you will send them to us.

Mr. RADER. Yes.

Senator METZENBAUM. You told us earlier you did not have the bills going back to 1978 in another matter. Is it possible you do have them?

Mr. RADER. I really do not think so, Senator.

Senator METZENBAUM. Well, what makes you so sure you have them in 1981 or 1983, but not——

Mr. RADER. Because I have gone through this file. You see, in—well, OK.

Senator METZENBAUM. And you say that Andersen paid for the cost of printing and reproducing the brief for the tenth circuit?

Mr. RADER. Well, we did the brief in our office. It was not a printed brief.

Senator METZENBAUM. Mr. Chairman, I have no further questions at this time, but I do think that I may possibly want Mr. Andersen, and I do know I want the newspaper reporter, because he just said that he was not stating the truth, and I think whether he was or he was not is relevant to our inquiry.

Senator QUAYLE. We will take that under advisement. You can confer with Chairman Hatch on that.

Senator METZENBAUM. I will.

Senator QUAYLE. And with that——

Senator METZENBAUM. Before you conclude, I just want to tell you how much I do appreciate your coming over today. It was really a privilege to have you. You did not holler at me——

Senator QUAYLE. Howard, you know I like you, but I will not say that feeling is mutual, this morning.

Mr. Rader, I just have one question that came up. When I realized I was going to have to come over, I asked what was one of the issues. And the issue, or at least the allegation that has been made, is that there was somehow that you advised at a time a client that they should not comply, or figure out a way of not complying with the warrant. That was certainly an implication.

Is that a well-founded allegation, or is that nonsense?

Mr. RADER. Well, the basic way a case would go that I would have—and I think it will make sense if I say it in this manner—is that a businessman would call me, and he would say, "OSHA is here to inspect me, with a warrant. What should I do?"

And I would say to him, "Well, your options are to either let him in, or to not let him in. If you do not let him in, you run the risk of being held in civil contempt; fines would be assessed against you. It is a pretty chancy proposition unless you are awfully certain that the inspection is illegal and that the warrant is illegal."

Sometimes the employer would make the decision not to allow the inspection. Sometimes he would make the decision to allow the inspection.

My experience was that most of these cases arose when an employer, for example, one in Oklahoma, who had been inspected

seven times in 6 years, and his competitors were not being inspected, felt like he had been treated unfairly, and he said, "What do I have to do to get a hearing in court about these inspections?" And I would advise him at that time, "The only way you can do that is to refuse to honor the warrant and then file a motion to quash in Federal court."

Those were not the majority of cases. Those cases did arise where employers felt they had been abused and treated unfairly.

Senator QUAYLE. In other words, you were just giving your legal opinion and the options that your client had?

Mr. RADER. Oh, you bet.

Senator QUAYLE. And there was no consultation directly, saying, "Well, go ahead and," for example, "ignore the warrant," or "Here is a way to obfuscate the warrant," and that kind of advice?

Mr. RADER. I would be pretty dumb to advise a client routinely to disregard a Federal court warrant, and then they would be held in civil contempt. I sure would not keep that client very long.

You always just explain the options to the client, and they make the choices. And as I say, the cases where they decided to refuse a warrant were those where they felt so strongly that they had been abused that they were willing to take that risk in order to obtain a Federal court hearing.

Senator QUAYLE. So it was simply rendering a legal opinion, not the advocacy of a way to pursue, or a way to get around, or not comply with the warrant?

Mr. RADER. That is right.

Senator QUAYLE. OK. That is the only question I had. Welcome to Washington. I say that seriously. I think you have—I have been here an hour, listening to the questions, and I would say that you did quite well. I certainly do not see anything wrong. I look forward to supporting your confirmation and I certainly hope that it goes through the committee here with a great deal of speed.

But having witnessed this morning, and you have seen what has happened this morning, we are not so sure about the speed of this thing going through, since we have been here for quite some time, but things may change. I think you did quite well and ought to be commended.

Good luck to you.

Mr. RADER. Thank you.

Senator QUAYLE. I am advised by staff that Senator Simon had requested that you submit the 10 decisions that you have actually voted on for the record.

Would it be possible for you to do that?

Mr. RADER. Sure. Do I just send them——

Senator QUAYLE. Just send them over to the committee here.

Mr. RADER. I would be glad to do that.

Thank you, Senator.

Senator QUAYLE. OK. Good luck to you.

[Additional material submitted for the record follows:]

STATEMENT OF THE
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
TO THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
ON THE NOMINATION OF ROBERT E. RADER, JR.
TO THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

March 12, 1986

The AFL-CIO urges the Senate Labor and Human Resources Committee to withhold its consent to the nomination of Robert E. Rader, Jr. to the Occupational Safety and Health Review Commission. Mr. Rader has so involved himself as an advocate in challenging OSHA's right to conduct inspections under the Occupational Safety and Health Act of 1970 that there is no possibility that he could retain an objective point of view necessary for carrying out the responsibilities as a commissioner on the Occupational Safety and Health Review Commission. Mr. Rader has made clear by his actions that he does not support the intent and the goals of the OSHAct and therefore is unqualified to carry out the functions of the Commission as described in the Act. The AFL-CIO opposes, in the strongest possible manner, the nomination of Robert E. Rader, Jr. to the Occupational Safety and Health Review Commission.

The Occupational Safety and Health Review Commission is the agency established by the OSHAct to adjudicate contests over the enforcement of provisions and standards provided by the OSHAct. These cases are central to our national government program to protect the lives and the safety and health of this nation's workers. Under the Occupational Safety and Health Act, the National Institute for Occupational Safety and Health (NIOSH) conducts research and OSHA is responsible for the promulgation and enforcement of standards. Authority for the abatement of hazards, however, ultimately rests with the Review Commission. Indeed, it is the Review Commission, through its adjudicatory role, that determines the appropriate application of OSHA standards and establishes precedent for the degree of protection that must actually be afforded workers.

The importance of the Review Commission's role and the requirement for neutral and qualified commissioners are clearly evidenced by the legislative history of the Occupational Safety and Health Act and by the statute itself.

The legislative history of OSHA reveals that assignment decisions of the adjudication responsibility of challenged OSHA enforcement was a central issue in the legislative debate. The labor movement and Senator Williams, the chief sponsor of the bill, favored vesting enforcement authority and adjudication responsibility with the Secretary of Labor with challenges subject to court appeal.

The business community and Senator Javits, another key sponsor, supported the establishment of a separate agency as the arbitrator of contested OSHA enforcement actions. It was argued that an independent panel composed of **impartial**, respected and capable members was necessary to ensure fair consideration of employer contests of OSHA decisions. (Legislative History p. 476). Senator Javits' position and amendment prevailed and a three member Occupational Safety and Health Review Commission was included in the final legislation.

Senator Javits, however, recognized the need for qualified commissioners to judge the broad and complicated health and safety problems that would be covered by the Act. (Legislative History pp. 469, 471). His amendment, and the final legislation specifically required commission members to be selected "from among persons who by reason of training, education or experience are qualified to carry out the functions of the Commission under this Act." (PL 91-596). The law left with the Senate, through its advice and consent authority, the final responsibility to see that commisioners "were people who had real qualifications to do the job." (Legislative History p. 465).

The intent of the Senate was to establish a Commission "that will be respected and is capable, **impartial** and **objective** in its approach." (emphasis added) (Legislative History p. 476).

President Reagan's first two appointments to the Review Commission were individuals with no experience or training in occupational safety and health. With Mr. Rader, we now have a nominee who is openly opposed to the stated intent and goal of the Congress and who, it is clear from the record, has a personal agenda and cause in placing restrictions on OSHA.

Mr. Rader has been active in erecting legal barriers to OSHA ispections since the 1970's. He was involved in Marshall v. Barlow's, the case decided by the Supreme Court in May 1978 that required OSHA to obtain a warrant, if so requested, in order to conduct inspections. Although Rader's arguments were successful in Barlow's, he continues to advise employers to refuse to honor OSHA inspections even when OSHA has a warrant. Such refusal has resulted in contempt rulings and the imposition of considerable penalties against Mr. Rader's clients in such cases as B. B. Andersen, Hackney, Palmer Steel, cases in state plan states like Virginia and Kentucky, and many others. There is no way to guage the injuries and the ill health that workers have suffered or have been exposed to as a result of Mr. Rader's advice to his clients.

According to one report, Mr. Rader is such an ideologue on the issue of OSHA inspections that he personally assumed the cost of a lawsuit after his client, the B. B. Andersen Co., decided they wanted to stop pressing the case. In this particular case, OSHA responded to a worker's complaint of hazazardous conditions at a construction site of the B. B. Andersen Co. Due to past problems gaining access to the company's job sites, OSHA obtained a warrant before attempting the inspection. The inspection found ten serious violations and two willful violations with proposed penalties of $12,600. Due to political intervention by Mr. Rader and the employer, the citations were never issued. None-the-less, Mr. Rader pursued the case. According to a letter he wrote to an employer's association, further legal action was necessary "to significantly restrict OSHA in the future." Fortunately, in this particular case, the U. S. Court of Appeals for the

Tenth Circuit rejected Mr. Rader's argument.

Anyone reading Mr. Rader's considerable writing on the subject of OSHA will search in vain for any mention of the right of safe and healthful working conditions for this nation's working men and women. Mr. Rader has absolutely no interest or desire "to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources."

Mr. Rader listed a number of suggestions to employers about compliance with the Occupational Safety and Health Act in a Baylor Law Review article, "How to Handle An OSHA Case: An Employer's Rights and Options" (Vol. 33:49):

- the employer should refuse to allow an OSHA inspection and should insist on a search warrant, based on probable cause;
- the employer should not automatically honor the warrant and allow the inspection;
- the employer should either file a motion with the issuing court to quash the warrant, or, alternatively, simply refuse to honor the warrant;
- employers should realize that there is very little information that they must furnish OSHA;
- the first and foremost reason to contest a citation is that failure to do so is an admitted violation on the record that can lead to allegations that a subsequent violation is repeat or wilful and therefore penalties will be higher;
- an employer is especially advised to contest a citation when there has been an injury or fatality to guard against third party negligence suits and resulting indeminification obligations;
- employers should be particularly careful in regards to "complaint" inspections as they afford great potential for harassment by unions, competitors, disgruntled employees and ex-employees;

- employers should be cautious of over-zealous OSHA Area Directors and compliance officers;
- an OSHA inspection is an unreasonable invasion of privacy, similiar to an invasion of one's home;
- OSHA is a vehicle for harassment by contentious labor organizations.

This Committee should ask itself whether Mr. Rader is the type of individual that is committed to the goals established by the Occupational Safety and Health Act of 1970 and is he objective enough to carryout the mandate of the Act.

The answer, of course, is that he is not. But even worse, Mr. Rader by his actions and his writings has demonstrated that he is opposed to any government role in the safety and health of this nation's workers and has relentlessly sought to promote that point of view.

Why does the Administration nominate someone to the Occupational Safety and Health Review Commission who is so obviously sectarian in a negative way in his approach to worker safety and health? The reason was revealed in a letter Mr. Rader sent in April 1981 to then Congressman George Hansen -- the founder of the Stop OSHA movement. Mr. Rader wrote to Hansen seeking intervention by political appointees in the B. B. Andersen case. As he said, "Hopefully, in light of the more reasonable attitude of the new administration, they will give us a hearing..."

The Administration not only wants to give the Stop OSHA movement a hearing, they want to give them a seat on the Occupational Safety and Health Review Commission.

This nation recently witnessed a tragedy in the explosion of the space shuttle Challenger. The Commission appointed by the President, composed of outstanding public servants and people knowledgeable about the space program, is attempting

under tremendous and unrelenting public scrutiny to discover the cause of the accident.

The Occupational Safety and Health Review Commission operates in relative anonymity but deals with issues and questions that are equally as important as those the Shuttle Commission is examining. To approve an individual with such a long history of fighting OSHA would be to deny American workers injured or killed on the job the same consideration and concern that we exhibit for the seven Challenger astronauts.

The AFL-CIO looks to this Committee to send a clear message to the Administration - the safety and health of this nation's workers is not a partisan issue. Mr. Rader is not capable of performing the duties of a Commissioner of the Occupational Safety and Health Review Commission and the Committee should cast a unanimous vote in opposition to his nomination.

Senator QUAYLE. The committee is adjourned.
[Whereupon, at 12:01 p.m., the committee was adjourned.]

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